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No. 90-1059-CFX
Status: GRANTED

Docketed:
January 2, 1991

Title: Simon & Schuster, Inc., Petitioner
v.
Members of the New York State Crime Victims Board, et al.

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Rauchberg,Ronald S., Sims,Charles S.

Counsel for respondent: Zwickel,Howard L.

NOTE: Due 010191-HOL

Entry	Date	Note	Proceedings and Orders
1	Jan 2 1991	G	Petition for writ of certiorari filed.
2	Jan 25 1991		Brief of respondent Members of NY Crime Victims Board, et al. in opposition filed.
3	Jan 28 1991		Brief amicus curiae of Motion Picture Association of America, Inc. filed.
4	Jan 29 1991		Brief amicus curiae of Association of American Publishers, Inc. filed.
5	Jan 30 1991		DISTRIBUTED. February 15, 1991
6	Feb 5 1991	X	Reply brief of petitioner Simon & Schuster filed.
7	Feb 19 1991		Petition GRANTED.
			**********
9	Feb 25 1991		Order extending time to file brief of petitioner on the merits until April 19, 1991.
12	Apr 18 1991		Joint appendix filed.
13	Apr 18 1991		Brief of petitioner Simon & Schuster filed.
18	Apr 18 1991		Brief amicus curiae of Association of American Publishers, Inc. filed.
10	Apr 19 1991		Lodgings received. 15 copies each, book Wiseguy and decision of NY State Crime Board. (Box)
11	Apr 19 1991		Brief amicus curiae of Motion Picture Association of America, Inc. filed.
14	Apr 19 1991		Brief amicus curiae of United States filed.
15	Apr 19 1991		Brief amici curiae of ACLU, et al. filed.
17	May 3 1991		Order extending time to file brief of respondent on the merits until May 31, 1991.
19	May 30 1991		Brief of respondents Members of NY Crime Bd, et al. filed.
20	May 31 1991		Brief amici curiae of Washington Legal Foundation, et al. filed.
21	May 31 1991		Brief amici curiae of Council of State Governments, et al. filed.
22	May 31 1991		Brief amicus curiae of The Crime Victims Legal Clinic filed.
23	May 31 1991		Brief amici curiae of National Organization for Victim Assistance, et al. filed.
24	May 31 1991		Brief amici curiae of Florida, et al. filed.
25	Jun 28 1991		Reply brief of petitioner Simon & Schuster filed.
26	Jul 12 1991		CIRCULATED.
27	Jul 19 1991		SET FOR ARGUMENT TUESDAY, OCTOBER 15, 1991. (1ST CASE)
28	Jul 26 1991		Certified copy of original proceedings received.
29	Aug 20 1991		Record filed.

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No. 90-1059-CFX

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30	Oct 15 1991	*	Received record from USDC S.D. NY (not certified). ARGUED.

No. 90-1059

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH and ANGELO PETROMELIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

May New York, by its "Son of Sam law," prohibit publishers from paying advances and royalties for the authorship of books and other expressive works about crimes, to persons accused or convicted of those crimes or who admit those crimes in those works, and require instead that such payments be made to the New York Crime Victims Board to compensate victims of these crimes, when the law (a) prohibits payment only for speech of certain specified content, leaving speech having other content outside its scope, (b) makes provision to compensate crime victims only from payments for speech, leaving crime victims to their ordinary remedies to reach all other assets of criminal tortfeasors, and (c) has in fact deterred the creation and publication of speech?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990
No. 90-

SIMON & SCHUSTER, INC.,

Petitioner,

— v. —

MEMBERS OF THE NEW YORK STATE
CRIME VICTIMS BOARD, GENNARO FISCHETTI,
GEORGE L. GROBE, JR., DIANE MCGRATH,
and ANGELO PETROMELIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Simon & Schuster, Inc., petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, *infra*, 1a-26a) is reported at 916 F.2d 777 (2d Cir. 1990). The decision of the District Court (27a-45a) is reported at 724 F. Supp. 170 (S.D.N.Y.

[1] Paramount Communications Inc. ("Paramount") is the corporate parent of Simon & Schuster, Inc. The only non-wholly owned subsidiary of either entity is TVX Broadcasting Group, Inc., partially owned by Paramount.

1989). The decision of the New York Crime Victims Board (46a-53a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (54a) was entered on October 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

New York Executive Law section 632-a (McKinney 1982 and Supp. 1990), commonly known as the Son of Sam law, is reproduced in the Appendix at 55a-58a.

STATEMENT

This case arises out of Simon & Schuster's publication of the best-selling book *Wiseguy*. *Wiseguy*, widely acclaimed as a skilled, revealing, and debunking book on organized crime, was subsequently made into an equally acclaimed film by Martin Scorsese, *GoodFellas*. The New York Crime Victims Board ("the Board") has determined that New York Executive Law section 632-a prohibited Simon & Schuster from making payments to *Wiseguy*'s principal source, Henry Hill, payments without which, the record shows without contradiction, the book would never have been written. The Court of Appeals, in an opinion by Judge Miner joined in by Judge Walker, agreed that section 632-a burdens freedom of speech sufficiently to require strict scrutiny under the

First Amendment, but nonetheless upheld the constitutionality of the statute. Judge Newman dissented.

1. New York Executive Law section 632-a targets only monies earned by the exercise of the rights of free speech and free press. It applies to every contract with a person "accused" or "convicted" of a crime for a book, film, radio or television broadcast, or magazine article containing "the accused or convicted person's thoughts, feelings, opinions, or emotions" regarding the crime or containing a "reenactment" of the crime. The law prohibits any payment to the accused or convicted person for such expression. Section 632-a (1).[2]

The statute is designed to have a broad reach. Its definition of "convicted" persons includes those (like Henry Hill here) who are deemed by the Board to have "voluntarily admit[ted]" the commission of crimes in the books at issue, even though they have not been formally accused or tried and convicted. Section 632-a (5), (10)(b).[3] The statute applies to all crimes, not only crimes of

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[2] References below to publishers and books should be understood as shorthand references to all the First Amendment actors and works to which section 632-a applies.

[3] The Board's application of section 632-a to Simon & Schuster rested solely on what the Board found to be Hill's "admission [in *Wiseguy*] to . . . involvement" in crimes (50a). Henry Hill had been immunized by state and federal prosecutors for the principal events written about in *Wiseguy*, was "cooperating with state and federal prosecutors under the Federal Witness Protection Program," and was never prosecuted for them. CA App. 92. In this respect (as well as others), the New York Son of Sam law differs substantially from the federal law, 18 U.S.C. § 3681, that provides, upon conviction for certain crimes, for forfeiture by convicted criminals of proceeds from contracts for expression, by order of the sentencing judge.

violence or felonies. It encompasses federal as well state crimes.[4] The Board applies the statute even when it cannot identify or foresee the existence of any victim of the crime.[5]

The Son of Sam law requires that a publisher who enters into a contract subject to the law provide a copy of the contract to the Board and pay over to the Board any monies that would be due under it. The Board is obliged to hold any funds received for at least five years, and then to pay them to any victim who has commenced an ordinary civil tort action and recovered a judgment. If no claims are made by victims or the others benefitted by the statute, the funds are returned to the person who earned them. Section 632-a (4).

"[C]onceived in haste, written in haste, and declared under the cry of the public for the Legislature to exact retribution . . . ", *In re Johnsen (Berkowitz)*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (Sup. Ct. Kings Co. 1979), section 632-a was enacted a week after its introduction in the state legislature, amid reports (never confirmed) that members of the media were offering to pay the as-yet unidentified and unapprehended "Son of Sam" killer for the exclusive rights to his story.

Three aspects of section 632-a are particularly noteworthy. First, in furthering the state's interest in compensating victims, the law reaches only payments for expression. Section 632-a (1). Accused or convicted persons may be paid for non-expressive activities without running afoul of the statute. They may receive

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4 *St. Martin's Press v. Zweibel*, No. 12273/89 (Sup. Ct., N.Y. Co. Feb. 1, 1990), slip op. (application to Foster Winans for federal securities fraud).

5 *See In re Bernhard Goetz* (Crime Victims Board, March 13, 1988), slip op. at 5, 6 (application of law "must be determined first and without consideration of whether any victim exists").

and retain gifts, inheritances and other unearned income from any source. Crime victims are left to their ordinary remedies regarding such assets.

Second, the law prohibits payment only for expression of specified content on a specified subject: "thoughts, feelings, opinions, or emotions" concerning a crime or a "reenactment" of a crime which the accused or convicted person is said to have committed. *Id.* Payments for any other speech — for example, payments to convicted killer Jean Harris for a work about prison conditions — are not prohibited.

Third, the special attachment created by the statute is not solely for the benefit of crime victims: if no crime victim has obtained a judgment, funds held by the Board will be distributed to other judgment creditors and to state tax authorities. Section 632-a (11).

The statutory scheme raises the question whether New York's motivation to enact the statute in fact related to victims' compensation, or instead was grounded in hostility to the speech within the statute's defined scope.

2. Simon & Schuster engaged Nicholas Pileggi, an experienced journalist who had previously written articles on organized crime for *The New York Times Magazine*, *New York Magazine*, and *Reader's Digest*, to write a book about Henry Hill, an organized crime foot-soldier cooperating with federal and state prosecutors under the federal Witness Protection Program. Simon & Schuster envisioned that the book would show what working for the mob actually entailed, and would shatter the romanticized view of books like *The Godfather*. Pileggi agreed to write the book after checking with law enforcement authorities about Hill's reliability and his capability of cooperating to the extent necessary. (6-7a; Court of Appeals Appendix ("CA App.") 82-83, 92-93.)

Hill was willing to cooperate only if he were compensated for the hundreds of hours Pileggi would require him to devote to the

project. As the majority below noted, "[t]here seems to be no question that Hill would not have agreed to participate in the project without the assurance he would be paid." (6a.) Compensating such primary sources is standard publishing industry practice (CA App. 76, 85, 93-94), and so Simon & Schuster's agreement to acquire and publish *Wiseguy* was made with both Pileggi and Hill and provided for payments to both. There was no dispute in the record, and the Court of Appeals noted, that the book could not and would not have been written without Hill's paid cooperation. (6a, 26a; CA App. 83-84, 93.)

Hill was paid an advance on royalties when he signed the publishing agreement, and was promised additional royalties based on sales. In return, Pileggi received Hill's cooperation on a virtually daily basis for more than two years. Pileggi's notes of hundreds of hours of conversations with Hill — the activities for which Hill was paid — occupy more than six linear feet of files, and form the raw material on which *Wiseguy* (and later *GoodFellas*) was based. (6a; CA App. 94.)

Wiseguy was widely praised as an important contribution to the literature of criminal behavior, and was favorably reviewed by George Will, Jonathan Yardley, *The New Republic*, and the *Kansas City Star*, among many others. (CA App. 84, 172-82.) Typical of the response accorded *Wiseguy* was a review by Professor G. Robert Blakey of Notre Dame Law School, author of the RICO statute, who wrote that

> Pileggi, fortunately, had the cooperation of Hill and his wife, Karen, so his story reflects a substantial amount of insight into the personalities of the protagonist . . . *Wiseguy* is . . . a welcome addition to the popular literature on organized crime, and, fortunately, it does not unnecessarily contribute to the sensationalism, glamorizing or romanticizing of organized crime or the mob.

New York Law Journal, April 15, 1988, at 2 col. 3. Jimmy Breslin, a newspaper columnist in New York City, called *Wiseguy* "the best book on crime in America ever written." (CA App. 84, 173.)

3. After administrative proceedings, the Board found in May 1987 that Simon & Schuster had violated section 632-a by failing to turn over to the Board the publishing agreement for *Wiseguy* when it was signed in September 1981, and by paying $96,250 for Hill's account. (50a.) The Board ordered Simon & Schuster to turn over to it any additional royalties payable to Hill, and a penalty equal to the $96,250 previously paid Hill unless Hill promptly paid that sum to the Board (which Hill never did). (51a-53a.)

The Board based its administrative determination squarely on *Wiseguy*'s content. Hill was deemed subject to the statute because *Wiseguy* "contains . . . his admission to involvement in such crimes" (50a), and *Wiseguy* was deemed subject to the statute because it "contains Hill's thoughts, feelings, opinions and emotions regarding [his] crime." *Id.*

4. In August, 1987 Simon & Schuster brought this action under 42 U.S.C. § 1983 against the members of the Board, seeking declaratory and injunctive relief invalidating the Son of Sam law on its face and as applied to the payments due Hill for helping to create *Wiseguy*.

Simon & Schuster moved for summary judgment, relying on affidavits from authors, publishers, and editors establishing that the statute's prohibition on payments for certain speech had and would continue to have "the inevitable effect of reducing the total quantum of speech." *Meyer v. Grant*, 486 U.S. 414, 423 (1988). For example, the President of G.P. Putnam's Sons told how Putnam, in the autobiography of a celebrity author, had recently edited out a discussion of a youthful crime in order to avoid the

snare of a Son of Sam law. CA App. 127-28. Pileggi explained that timely paying Hill had been essential to the creation of Wiseguy, and told how he had foregone at least three specific book projects that he would have pursued but for his concern over Son of Sam law interference. CA App. 95-96. Publishers cited examples of works that would not have been published, or would have been bowdlerized, had the Son of Sam law applied at the time and place of publication, including works by Martin Luther King, Jr., Malcolm X, Lenny Bruce, Whitaker Chambers, Armand Hammer, and Abbie Hoffman. CA App. 71, 107, 126.

On October 24, 1989, the District Court upheld the law, on cross motions for summary judgment, as an "incidental" limitation on speech. The Court declined to apply strict scrutiny even though the law singled out speech for special adverse treatment and even though the law's application depends on the content and subject matter of speech and the identity of the speaker. (38a-42a.) This Court's recent holding in *Meyer v. Grant*, 486 U.S. 414 (1988), that direct restrictions on payment for speech are equivalent to direct restrictions on speech and are therefore subject to strict scrutiny, was distinguished (38a) as applying only to political speech. Simon & Schuster's showing that the law had already deterred the creation and publication of protected speech, and would continue to do so, was disregarded as "conjectural." (36a.)

5. A split panel of the Court of Appeals affirmed under a different analysis. (1a-26a.)

The Court unanimously disagreed with the District Court on the proper level of scrutiny, all members of the panel holding that the statute imposes a direct burden on free expression requiring the application of strict scrutiny. (10-13a, 19a.) Three independent reasons were given: the statute's content-based application, its "singl[ing] out the media for differential treatment," and its "effect of excluding from circulation the expression of criminals who would write about their crimes . . ." (12-13a.)

The majority nonetheless upheld the statute, finding it "narrowly tailored to serve the State's [compelling] interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization." (15a.)

Judge Newman dissented on the ground that the Board had not justified the suspect distinctions drawn by the statute (24-25a):

> When New York, understandably outraged by the prospect that a criminal might profit from a book about his crime, tries to enact a victim restitution statute that applies only to protected speech, rather than all income-producing activity, and, then, only to speech of specified content, rather than all speech, it encounters First Amendment obstacles that in my judgment are insuperable.

The dissent also found the statute ill-suited to achieve its objective, noting that the five escrow accounts established in the statute's first eleven years (three for the same victim) were "more than offset by the royalties that would have been earned on books that were not published because of this statute." (25a.)

REASONS FOR GRANTING THE PETITION

This case presents the Court with its first opportunity to address the progenitor, the most broad-reaching, and by far the most important of the approximately thirty statutes enacted after 1979 attempting, in various ways, to capture for crime victims any moneys earned by "criminals," variously defined, through writing about their crimes.[6]

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[6] The statutes are cited *infra* at 59a.

Laws restricting payments for speech, like other laws directly burdening speech, face a "well-nigh insurmountable" hurdle of justification. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Here, by upholding a statute that bars publishers from paying authors for speech, and, worse, one whose application depends on the content of the speech in question, the Court of Appeals gave lip-service to strict scrutiny while treating it as a mere form of words. This statute can pass the test of strict scrutiny only if that test is eased beyond recognition.

The weakening of the bulwark against censorship that strict scrutiny has provided is not the only reason for granting review; the judgment below will cause substantial practical harm in addition to its doctrinal damage. Because the judgment was entered by the Court of Appeals whose jurisdiction encompasses the great bulk of this nation's general book publishers, and will (as the record establishes) predictably result in repeated but unreviewable decisions by authors not to create, and by publishers not to commission and publish, works of substantial social value, this Court's review is urgently warranted.

I

THE DECISION UPHOLDING A STATUTE THAT PROHIBITS PUBLISHERS FROM COMPENSATING AUTHORS AND SOURCES FOR SPEECH AND CONCEDEDLY RESTRICTS THE CREATION AND CIRCULATION OF SPEECH CONFLICTS WITH *MEYER V. GRANT*, *CAREY V. BROWN*, AND OTHER DECISIONS

The Court of Appeals' holding that New York could constitutionally prohibit Simon & Schuster from paying Henry Hill for assisting Nicholas Pileggi in the researching and writing of *Wiseguy* conflicts sharply with two separate strands of this Court's free speech jurisprudence.

Seven times in the last fifteen years this Court has held that statutory restrictions on expenditures for speech are direct burdens on speech that are subject to strict scrutiny, and has struck those restrictions down.[7] Most recently, in *Meyer v. Grant*, 486 U.S. 414 (1988), this Court unanimously struck down a law prohibiting the proponents of an initiative from paying petition circulators who engaged in speech as they sought signatures. The Court held that the denial of payment for expressive activity constitutes a direct "burden" on that activity" which is "well-nigh" impossible to justify. *Meyer v. Grant*, 486 U.S. at 423, 425.

This Court's repeated recognition as a matter of common sense that prohibiting payments for speech must have "the inevitable effect of reducing the total quantum of speech"[8] is here reinforced by the Court of Appeals' specific finding that "the statute under attack here has the effect of excluding from circulation the expression of criminals who would write about their crimes if the price were right." (12a.) The dissent agreed that the statute "has already led to decisions not to publish books of high public interest." (24a.)

Affidavits submitted on behalf of Simon & Schuster established that *Wiseguy* would not have been created had Simon & Schuster not promised Hill timely compensation, and that if the law had been in effect at the relevant times and places other works would not have been undertaken at all or would have been altered in

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[7] *See Buckley v. Valeo*, 424 U.S. 1 (1976); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Schaumberg v. Citizens For A Better Env't*, 444 U.S. 620 (1980); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Meyer v. Grant*, 486 U.S. 414 (1988); and *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988).

[8] *Meyer v. Grant*, 486 U.S. at 423.

content as a consequence of the law. Senior editors and officers of leading publishers described how the law would continue to result in self-censorship. *See* above at pp. 7-8.[9]

The judgment below is equally at odds with the cases presumptively forbidding regulation based on the content or subject matter of speech, or the targeting of the press when generally applicable economic legislation would suffice. Those cases require both the regulation itself and the distinctions it draws to be narrowly tailored to serve compelling state interests. For example, in *Carey v. Brown*, 447 U.S. 455, 461 (1980), this Court held that "the justifications offered for any distinctions [the statute] draws must be carefully scrutinized," and struck down a law prohibiting non-labor picketing in residential neighborhoods because the state's compelling interest in fostering residential tranquility could not justify a distinction between labor and non-labor picketing. *See also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987); and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 26 (1989) (White, J., concurring) (content-based regulation "is plainly forbidden by the Press Clause of the First Amendment").

The Son of Sam law's content-based distinctions and its targeting of the media cannot be justified as narrowly tailored to meet the state's important interest in crime victims' compensation, and the Court of Appeals did not suggest otherwise. That interest would justify a generally applicable statute enhancing the ability of crime victims who obtain civil judgments to reach any payments due or assets held by the tortfeasor, regardless of source, but never a law that applies only to payments for (certain) speech.

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[9] The state made no attempt to dispute either these or any of the other affidavits establishing the statute's deterrent effect on speech.

Recognizing that crime victims' compensation cannot justify the law, the majority in the Court of Appeals offered two different rationalizations — that the statute is tailored to meet the state's interest in ensuring that victims are compensated from the proceeds of speech which "exploits" the crime (13a), and that criminals are more likely to obtain assets for victims' compensation from contracts for expression than from any other source. (15a.) In accepting these justifications, the majority skewed strict scrutiny unrecognizably.

As Judge Newman correctly observed (20-21a), by finding the statute narrowly tailored to do exactly what it does do (attaching for the benefit of crime victims only payments for certain expression), the majority side-stepped its obligation to find a compelling justification for the distinctions and press-targeting that this Court's cases make highly suspect.

The majority's circularity would render strict scrutiny toothless. Just as Illinois' statute barring only non-labor picketing outside private homes could not be justified as narrowly tailored to keep non-labor picketing from disturbing tranquility (why should Illinois not protect tranquility against all picketing?), *Carey v. Brown*, 447 U.S. at 465, so too, New York's Son of Sam law may not properly be justified as "narrowly tailored to the state's interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization." (15a.) Why should New York not assure that crime victims are compensated from all the assets in the hands of criminals, and not just payments by publishers for certain instances of the exercise of free speech rights?

The law's gerrymandered application cannot be justified by restating the interest in compensating victims as "assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation . . .", thereby considering payments for speech as the "exploitation" of crime. (13a.) It is highly questionable whether speech can ever be

deemed "exploitation" of crime; certainly many works that would have been subject to the statute if it had been enacted earlier (*e.g.*, *Where Do We Go From Here* by Martin Luther King, Jr., *Soul on Ice* by Eldridge Cleaver, *The Autobiography of Malcolm X*, *Manchild in the Promised Land* by Claude Brown, and *On Civil Disobedience* by Henry David Thoreau), as well as *Wiseguy* itself, cannot meaningfully or constitutionally be treated as the "exploitation" of crime. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (protected speech cannot be treated as harmful); *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (offense to public not valid justification for burdening speech).

Even assuming payment for speech could sometimes be considered the "exploitation" of crime, this law over-inclusively prohibits payment to an accused or convicted person for any work mentioning the crime, no matter how slight the mention or how unimportant in the context of an entire book. Malcolm X was already famous as a Black Muslim political leader when he wrote the compelling manifesto which is his *Autobiography*. Had the Son of Sam statute been enacted by then, he would have been prohibited for five years from receiving any of the compensation due him for the work because it also discusses the criminal activity of his youth. Such a book is hardly the exploitation of crime. New York nonetheless applies its Son of Sam law in just such circumstances, that is, to works dealing mostly with matters other than the crime. *See Children of Bedford, Inc. v. Petromelis*, 143 Misc. 2d 999, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989) (upholding application and constitutionality of Son of Sam law), *aff'd mem.*, 556 N.Y.S.2d 483 (1st Dep't 1990), *appeal pending*.

Similarly, the payments Simon & Schuster promised to Henry Hill were for the hundreds of hours he spent with Pileggi describing in detail his life from childhood, his marriage, and his experiences with various members of organized crime, and did not "exploit" his fame and notoriety (for he had none) or "exploit" any crime victims (for as its reviewers noticed, the book does not do so, and does something else, something quite valuable, instead).

Nor does the interest in avoiding the "exploitation" of a crime until its victims are compensated explain the law's preference for other judgment creditors and state tax authorities. Section 632-a (11).

The "exploitation" justification renders the law substantially underinclusive as well. Criminals are paid for other activities made possible through the experiences they gained from their crimes (*e.g.*, those who testify and enter the witness protection program, or computer hackers who become computer security consultants and the like), but the Son of Sam law does not prohibit payment for such "exploitation."

At bottom, this formulation too (preventing "exploitation of . . . crime while the victims of that crime are in need of compensation by reason of their victimization") rests on the state's interest in compensating crime victims. Assuming that New York is offended at the thought of a criminal enjoying the proceeds of a book about a crime while the victim of the crime is left uncompensated, is it any less offensive for the criminal to enjoy the proceeds of a book about, say, prison conditions, or to enjoy the dividends from a stock portfolio, while the victim is uncompensated? Plainly not, yet New York draws precisely these distinctions, and the majority in the Court of Appeals found them justified by compelling necessity.

Nor can the statute's differential application be justified on the ground that "as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes." (15a.) Such blithe and unproven assertions do not amount to compelling necessity when generally applicable regulation would serve as well without raising any censorial threat. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. at 231-33; *Carey v. Brown*, 447 U.S. at 464-69. Moreover, the legislature did not find, the state so far has not argued, and there is little reason to believe that the sole asset of most criminals — especially those likely to obtain book contracts — is the opportunity to tell their stories, as the dissent

observed. (21a.) (White-collar defendants with other assets are the most likely of criminal defendants to obtain lucrative book contracts.) In any event, as Judge Newman noted (25a), loss of income from books not published likely exceeds any payments attached by the Board. The law on balance thus works against the compensation of crime victims.

In sum, a crime victim's need for compensation extends to all the tortfeasor's assets, not just those arising from speech. If New York's existing remedies are in some respects inadequate to ensure that crime victims' tort judgments can be satisfied,[10] the First Amendment compels New York to improve those measures without singling out (certain) speech for special treatment.

II

THE QUESTION PRESENTED IS IMPORTANT BECAUSE THE JUDGMENT BELOW, UNLESS REVIEWED BY THIS COURT, WILL DETER PROTECTED SPEECH IN WAYS THAT WILL ESCAPE REVIEW

Section 632-a aborts works before they are written by deterring "criminal" writers from seeking publishing contracts for works for which they cannot be paid, by deterring publishers from seeking out and pursuing such opportunities, and by pressuring writers and publishers to delete any content which will trigger the law's application. It therefore results in self-censorship that is extremely unlikely to present itself for judicial review. Review of the

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10 The Board made no attempt to prove that the remedies afforded by traditional New York law were inadequate for crime victims or any other claimants. Simon & Schuster, by contrast, showed that those remedies had been used successfully in favor of crime victims in cases where the Son of Sam law did not apply. CA App. 108-09.

judgment below is therefore a matter of high importance if protected speech is to be protected in fact and not just in name.

Undisputed affidavits from writers and publishers established that, by prohibiting payments to writers and primary sources that are standard in the industry and enable people to devote their time to the creation and publication of books, the Son of Sam law inhibits and prevents the publication of works to which it might apply or results in their alteration. For example, "[s]ince learning of the claimed scope and legal consequences of Section 632-a", Michael Korda, Simon & Schuster's editor-in-chief, has "been compelled to make it [his] practice to reject any book that will entangle" his company in the law's reach. CA App. 86.

Random House and G.P. Putnam's Sons identified *Witness* by Whitaker Chambers, *The Essential Lenny Bruce*, Joe McGinniss' *Fatal Vision*, Robert Garwood's account of his years as a prisoner of war, *Conversations with the Enemy*, and Abbie Hoffman's *Square Dancing in the Ice Age* as among the books that mention crimes and would probably never have been published had the Son of Sam law been in effect at the time of publication. CA App. 107, 126. The editor-in-chief of Time, Inc. noted the value to readers of

> a full account of the criminal activity or, often more significant, the perspective of the alleged criminal concerning his motivation . . . [I]t is in society's interest that the views, for example, of John Dean or John Ehrlichman on the Watergate scandal; of Ivan Boesky or Martin Siegel on insider trading; of Oliver North or John Poindexter . . . on the Iran-contra affair . . . and even of Bernhard Goetz on the criminal justice system be made available to the public.

CA App. 121-22. *See also* pp. 7,8 and 11-12, *supra*.

The application of the Son of Sam law here, based not on any crime found by a court but instead on "admissions" in *Wiseguy* itself, will require publishers carefully to review autobiographies, political memoirs, collections of personal essays, and other works to consider deleting matter possibly covered by the law. If the next author of personal recollections of the civil rights movement admits, as did Martin Luther King, Jr. in his "Letter From a Birmingham Jail," to engaging in conduct possibly amounting to a criminal trespass, the publisher or author might feel compelled to delete the passage rather than hope it will escape the notice of the Crime Victims Board.

Unless the judgment below is reviewed and reversed by this Court, writers and publishers will continue to face powerful pressures to avoid projects that run afoul of the Son of Sam law. Notwithstanding the hardiness of some committed writers and publishers, so long as pursuing a book subject to the Son of Sam law requires subjection to a lengthy administrative process and possible litigation, during all of which covered payments cannot be made, writers and publishers will exercise self-censorship to avoid section 632-a, and much protected speech that would otherwise have been created and published will never see the light of day. This Court's role as final guardian of the First Amendment surely warrants review to ensure that statutes such as New York's Son of Sam law do not impose censorship inconsistent with the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1990

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1044—August Term, 1989

(Argued March 22, 1990 Decided October 3, 1990)

Docket No. 89-9192

SIMON & SCHUSTER, INC.,

Plaintiff-Appellant,

—against—

GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS, individually and in their capacities as members of the New York State Crime Victims Board,

Defendants-Appellees.

Before:

NEWMAN, MINER and WALKER,

Circuit Judges.

Appeal from summary judgment entered in United States District Court for the Southern District of New York (Keenan, *J.*) dismissing action to declare unconstitutional New York statute requiring earnings of criminal

derived from exploitation of crime to be deposited in escrow account maintained by Crime Victims Board to assure payment of civil judgments later recovered by victims of exploited crime.

Affirmed.

Judge Newman dissents in a separate opinion.

RONALD S. RAUCHBERG, New York, N.Y. (Charles S. Sims, Proskauer Rose Goetz & Mendelsohn, New York, N.Y., Mark Morril, Eric Rayman, Simon & Schuster, Inc., New York, N.Y., of counsel), *for Plaintiff-Appellant*.

HOWARD L. ZWICKEL, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Susan L. Watson, Assistant Attorney General, New York, N.Y., of counsel), *for Defendants-Appellees*.

Leon Friedman, New York, N.Y. and Arthur Eisenberg, New York, N.Y., *filed a brief for amici curiae PEN American Center and the New York Civil Liberties Union*.

R. Bruce Rich, New York, N.Y. (Robin E. Silverman, Weil Gotshal & Manges, New York, N.Y., of counsel), *filed a brief for amicus curiae Association of American Publishers, Inc.*

MINER, *Circuit Judge*:

Plaintiff-appellant Simon & Schuster, Inc. ("Simon & Schuster") appeals from a judgment entered in the United States District Court for the Southern District of New York (Keenan, *J.*) upon an order granting the motion of defendants-appellees, Members of the New York State Crime Victims Board ("Victims Board"), for summary judgment pursuant to Fed. R. Civ. P. 56 and denying its own motion for the same relief. Simon & Schuster, a leading book publisher, brought this action to challenge the constitutionality of section 632-a of the New York Executive Law. N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1990). Section 632-a requires that the profits derived by a criminal from the exploitation of his or her crime be deposited as earned in an escrow account maintained by the Victims Board as a means of preserving funds for the satisfaction of civil judgments later recovered by the victims of the exploited crimes. The challenge to the statute is grounded in the first and fourteenth amendments. Simon & Schuster asserts that the statute imposes a direct restriction on speech, is therefore subject to strict scrutiny, and cannot survive the scrutiny. The Victims Board contends that the provision in question does not burden freedom of speech in any way, imposes only an incidental burden if it does and, in any event, furthers a compelling state interest in a manner narrowly tailored to do so.

In granting summary judgment to the Victims Board and denying that relief to Simon & Schuster, the district court determined that "[t]he state's interest in compensating crime victims is unrelated to the suppression of free expression and any burden on free expression is

merely incidental." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 724 F. Supp. 170, 177 (S.D.N.Y. 1989). Finding the incidental burden justified by the important interest of the state in compensating the victims of crime, the district court concluded that section 632-a "is not unconstitutional on its face nor as applied to plaintiff." *Id.* at 179.

We agree with Simon & Schuster that the statute in question imposes a direct, rather than an incidental, burden on speech and that it therefore must meet the requirements of the strict scrutiny test to survive the constitutional challenge. We conclude, however, that the statute meets the test and accordingly affirm the judgment, although on grounds different from those relied on by the district court.

BACKGROUND

Originally enacted in 1977 and amended three times thereafter, section 632-a of the New York Executive Law provides that each

> legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the [Crime Victims B]oard and pay over to the [B]oard any moneys which would otherwise, by terms of such

> contract, be owing to the person so accused or convicted or his representatives.

N.Y. Exec. Law § 632-a(1); *see* 1977 N.Y. Laws 823; 1978 N.Y. Laws 417; 1986 N.Y. Laws 74.

The statute directs that the Victims Board deposit the monies so received "in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime." N.Y. Exec. Law § 632-a(1). To gain access to the funds, the victim must recover a money judgment in a civil action brought against the criminal within five years of the establishment of the escrow account. *Id.* Civil judgments obtained by crime victims rank third in the order of priority of claims that may be paid out of the escrow account. *Id.* § 632-a(11)(c) (McKinney Supp. 1990). According to the statute, the order of priority, from first to fifth, is as follows: attorney's fees granted by a court of competent jurisdiction for representation of the accused at any stage of the criminal proceedings and expenses allowed by the Victims Board for the production of monies paid into the escrow account, the total of such fees and expenses not to exceed one-fifth of the account; subrogation claims of the state for payments made to a victim, not to exceed one-half of the civil judgment obtained by a victim; victims' civil judgments; judgments of other creditors and claims of persons presenting lawful demands through the person accused or convicted of the crime, including the demands of tax authorities; and the claims of the person accused or convicted of the crime. *Id.* § 632-a(11)(a)-(e).

This action tests the requirements imposed by the statute upon book publishers generally and Simon & Schuster in particular. It had its genesis in a decision made at the highest levels of the Simon & Schuster organization to commission a book dealing with the life and activities of a career criminal named Henry Hill. At the time that Hill came to the attention of the publisher, he was cooperating with state and federal prosecutors under the Federal Witness Protection Program. The idea of the book was to demonstrate the pedestrian activities of a low-level member of a criminal enterprise and to dispel commonly-held romantic notions about life in a crime "family." For the project, Simon & Schuster sought out Sterling Lord, a prominent literary agent, for assistance in finding an author willing to write the book in cooperation with Hill. Lord found Nicholas Pileggi, an experienced crime writer, and ultimately negotiated a book contract subscribed by Hill, Pileggi and Simon & Schuster on September 1, 1981. An earlier agreement, dated August 21, 1981, to which Hill, Pileggi and Lord were parties, provided for the division of payments to be received from the publisher. There seems to be no question that Hill would not have agreed to participate in the project without the assurance he would be paid.

Pileggi spent more than three hundred hours with Hill, who provided the author with extensive information about his life in crime. The result of their collaboration was a popular and widely-acclaimed book, originally published by Simon & Schuster in January of 1986, bearing the title *Wiseguy*. The book describes in detail the crimes in which Hill participated during his career as a "wiseguy" or hoodlum: bribery, assault, extortion, theft, burglary, arson, drug dealing, credit card fraud and murder. Among the more celebrated

crimes in which he was involved were the theft of nearly six million dollars in cash and jewelry from the Lufthansa terminal at Kennedy airport and the bribery of Boston College basketball players. Although he served brief prison terms, Hill was prosecuted for only a few of the crimes admitted to in the book. Needless to say, there were many, many victims of the crimes committed by Henry Hill, and a great number of those victims are identified in *Wiseguy*. According to Simon & Schuster, more than 90,000 copies of the book in its trade edition have been sold, and more than one million copies of a soft cover edition, published in February of 1987, are in print.

On January 31, 1986, counsel for the Victims Board wrote to Simon & Schuster: "It has come to our attention that you may have contracted with a person accused or convicted of a crime for the payment of monies to such person." Citing section 632-a of the Executive Law, the counsel called upon the publisher to provide the Victims Board with copies of "all such contracts," the dollar amounts and dates of payments to Henry Hill, and certain other information stemming from the publication of *Wiseguy*. By letter dated May 22, 1986, Simon & Schuster provided to the Victims Board the dates and amounts of payments made by the publisher "to the Sterling Lord Agency for the account of Mr. Hill." The total of the amounts shown was $96,250. Enclosed with the letter were copies of the August 21, 1981 and September 1, 1981 agreements, as well as copies of two agreements extending the manuscript delivery date. Simon & Schuster has suspended further payments to Hill, as requested by the Victims Board.

On June 15, 1987, the Victims Board served upon Simon & Schuster a *Notice* and a *Proposed Determination and Order*. Among the proposed findings were the following: the September 1, 1981 Contract "is of the type regulated by Executive Law § 632-a" and "a copy of such Contract should have been turned over to the Crime Victims Board in 1981 at the time of execution"; the book *Wiseguy* "contains thoughts, feelings, opinions and emotions regarding crimes committed by Henry Hill as well as his admission to involvement in such crimes"; all payments to "Hill or his representatives under the Contract must be turned over to the Crime Victims Board to be held in escrow for victims of crimes committed by Henry Hill"; no payments due Nicholas Pileggi, who is a co-author and not a representative of Hill, are "subject to the mandate of Executive Law § 632-a"; and Sterling Lord is entitled to "make application to the Board for payment of necessary expenses for the production of monies paid into the escrow account to be established by the Board."

In accordance with the proposed findings, the Victims Board proposed to order that Hill pay over to the Board all monies theretofore received, plus interest, less commissions paid to Sterling Lord; that in the event Hill failed to do so, Simon & Schuster "shall turn over to the Board the total of monies it wrongfully distributed to Henry Hill"; that Simon & Schuster transfer to the Board all payments due Hill, "including the $27,958 presently held, as well as any and all future royalties or other monies that would otherwise be payable to Henry Hill or his representatives under the Contract"; and that Sterling Lord pay to the Board any monies received as Hill's representative from Simon & Schuster "as well as any other past or future monies received or to be

received from the Contract on account of Henry Hill." No fact-finding having been requested by Simon & Schuster or any other person, the *Proposed Determination and Order* became the *Final Determination and Order* of the Victims Board on July 15, 1987 in conformity with the *Notice* served by the Board.

The action giving rise to the appeal before us, brought under 42 U.S.C. § 1983 (1982) to enforce rights guaranteed by the United States Constitution, was commenced on August 3, 1987 as a consequence of the Victim Board's order. Sought in the prayer for relief in Simon & Schuster's complaint were: an order declaring section 632-a violative of the first and fourteenth amendments "on its face and as applied"; an injunction prohibiting the Victims Board "from taking any steps to apply or enforce" the statute; and an order awarding attorneys' fees pursuant to 42 U.S.C. § 1988. Some time after the filing of an Answer by the Victims Board, cross-motions for summary judgment were filed. On September 19, 1988 the motions came on for argument before Judge Keenan, who granted the motion of the Victims Board and denied the motion of Simon & Schuster in a comprehensive Opinion and Order filed on October 26, 1989.

Addressing the first amendment challenge, Judge Keenan wrote:

> Applying [*United States v. O'Brien*, 391 U.S. 367 (1968) (statute criminalizing destruction of draft card is not directed at expressive activity and imposes incidental restriction on First Amendment freedom no greater than is essential)] to section 632-a, the Court finds first that the New York state legislature acted within its authority in enact-

ing the statute. Both parties agree that victim compensation is necessary and that the most effective means of compensating crime victims should be developed. Related to this authority, then, is the important governmental interest of victim compensation. The Court has determined that this interest is unrelated to the freedom of expression. As has been discussed, the interest in compensating victims does not involve suppressing speech, but merely attaching the proceeds of that speech for the benefit of the victim.

Finally, the Court finds that any incidental restriction on the First Amendment freedom imposed by section 632-a is no greater than is essential for the government's interest in compensating crime victims. The law is drawn not to prohibit expressive activity, but to garnish the proceeds so that they will be used in a productive manner. The statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from directly profiting from his or her crime.

724 F. Supp. at 178-79.

The district court also rejected Simon & Schuster's fourteenth amendment claim that the statute is overbroad and vague. That claim is not advanced on appeal.

DISCUSSION

We think that the District Court erred in testing section 632-a under the standards established in *United States v. O'Brien*. The statute addressed in *O'Brien* prohibited the destruction of draft cards and therefore was not directed at speech, although it imposed an incidental

burden on expression. The Supreme Court held that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. To pass constitutional muster, a statute implicating such limitations must 1) be enacted within the constitutional power of the government, 2) further a substantial interest of government not related to suppression of free speech and 3) not impose incidental limitations greater than are essential to the governmental interest. *Id.* at 377. It is this test that the district court applied to section 632-a, despite the Supreme Court's requirement "that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule." *Texas v. Johnson*, 109 S. Ct. 2533, 2541 (1989).

It cannot be said that the governmental interest advanced by section 632-a bears no relation to expression, since the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes. The possibility of a payday five years or more down the road, depending on claims against the escrow fund, can hardly be seen as providing an adequate financial incentive. Without a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write. It is now settled that the denial of payment for expressive activity constitutes a direct burden on that activity. *Meyer v. Grant*, 486 U.S. 414, 422-24 (1988). The statute examined in *Meyer* allowed proposals to amend the Colorado constitution to be placed on the ballot at a general election if a sufficient number of people signed an initiative petition. The same statute made it a felony to pay petition circulators. The Supreme Court, after concluding that the *Meyer*

case involved a restriction subject to "exacting scrutiny," *id.* at 420, held that "[t]he Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State has failed to justify." *Id.* at 428.

The district court distinguished the statute examined in *Meyer* from section 632-a on the ground that the former "abridged the right to engage in political speech which is at the 'core' of the First Amendment," while the latter "has no abridging effect on political speech" and "merely functions to prevent criminals from capitalizing on their crimes." 724 F. Supp. at 177. A distinction based upon political advocacy does not seem to us to be a valid one. According to *Meyer*, the notion that the solicitation of petition signatures involves protected speech follows from *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), a case involving regulation of the financial aspects of charitable solicitation and not core political speech. 486 U.S. at 422, n.5; *see also Riley v. National Fed'n of the Blind*, 487 U.S. 781, 787-88 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 959-60 (1984). Protected expression comes in many forms other than ideological or political speech. Indeed, the first amendment guarantee has been held to extend to the performance of musical and dramatic work. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

As has been demonstrated, the statute under attack here has the effect of excluding from circulation the expression of criminals who would write about their crimes if the price were right. However, "[f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state

interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Section 632-a also serves to single out the media for differential treatment based on expressive content, since no assets other than those derived from the recounting of the criminal's story are subject to attachment in the manner provided by the statute. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-31 (1987). Such differential treatment also must survive the strict scrutiny test: a state interest that is compelling and legislation narrowly constructed to accomplish its purpose. *Id.* at 231.

It cannot be gainsaid that the state has a very strong interest in preventing criminals from profiting from their crimes. *See Riggs v. Palmer*, 115 N.Y. 506, 511-12, 22 N.E. 188, 190 (1889); *cf. Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2654 (1989) (governmental interest in depriving criminal of economic power derived from crime). But the state has a much stronger, indeed a compelling, interest in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization. The statute in question cannot provide assurance that all criminals will not profit from the exploitation of their wrong-doing. Even under the statute, criminals may receive payments deposited in the escrow fund by publishers if no victims come forward with claims or if funds remain after all claims are paid. A great societal interest is served, however, in barring criminals from profiting at the expense of victims who are in need of compensation and press their demands for restitution. Our society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim

remains uncompensated for financial loss occasioned by the crime.

The compelling state interest that spawned the enactment of section 632-a by the New York legislature is revealed in the legislative history:

> Currently a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering. The requirement of a civil action will prevent the abuse of this privilege.

See Assembly Bill Memorandum Re: A 9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws 823. The Division of Criminal Justice Services also recognized the compelling state interest in a letter of support for the legislation addressed to the Governor's counsel:

> Though hardly a new phenomenon, there has been a recent realization by the general public that where a defendant is a well-known personality or the crime with which he is charged is one that has aroused a high degree of public interest, he is in a position to make a considerable amount of money from articles, books or television accounts of his life, times and crimes. . . .
>
> [T]his bill takes cognizance of the situation and seeks to redirect the money flow from the criminal to his victims. As an expression of the concept of simple justice it cannot be faulted. It is merely another facet of the oft-repeated maxim that crime does not (or should not) pay.

See Memorandum from Robert Schlanger, Division of Criminal Justice Services, to Judah Gribetz (August 3, 1977), *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws 823.

The purpose of the statute, of course, is not to suppress speech but to assure that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited. In this way, the compelling state interest described above is served. A statute of this type has other purposes as well. It "not only prevents a criminal's unjust enrichment, but also it: (1) decreases the likelihood that society will have to support victims of crime through social programs; (2) satisfies victims' sense of justice and desire for retribution; and (3) increases the criminal's awareness of the consequences of his crime." Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353, 1367 (1988) (footnotes omitted).

It seems to us that section 632-a is narrowly tailored to the State's interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization. The statute recognizes that the only way a criminal can profit directly from a specific crime involving a particular victim, other than by obtaining any proceeds of the crime itself, is by writing or talking about or reenacting it. The statute also recognizes that, as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes. The first

amendment right to speak is restricted only as a consequence of their inability to profit until the victim is compensated. Section 632-a is designed to tie up the proceeds until victims have had an opportunity to make their claims for compensation. It provides a specialized form of attachment and is designed to freeze the proceeds of storytelling by criminals for the benefit of those whose misfortunes gave rise to the story.

As to Simon & Schuster's argument that New York Civil Practice Law & Rules article 62 (McKinney 1980 & Supp. 1990), the general statutory provision for attachment in New York, is sufficient to assure satisfaction of potential judgments by victims, it suffices to say that the provisions of article 62 simply are too limited to fulfill the State's interest in seeing that victims are the first to be compensated from the proceeds of crime story exploitation. While article 62, like section 632-a, serves a security purpose by requiring that property be held for satisfaction of possible future judgments, it is restricted to situations where the defendant: is a nondomiciliary residing outside New York or a foreign corporation not qualified to do business in New York; is a resident or domiciliary who cannot be served despite diligent efforts to do so; has disposed of, removed or secreted property or is about to do so, with intent to defraud creditors or frustrate a possible judgment; or is defending an action based on a judgment entitled to full faith and credit. N.Y. Civ. Prac. L. & R. 6201. Recovery by many crime victims would be rendered impossible if attachment were limited to one of these categories.

Simon & Schuster also contends that section 632-a is not well tailored because it is both underinclusive and overinclusive. It is said to be underinclusive as applied

in this case because it is addressed to only one kind of book and the royalties derived therefrom. In this connection, Simon & Schuster notes that the statute fails to reach such income as might be earned by a thief hired as a consultant for his or her expertise or received as royalties from other kinds of books. The answer to the underinclusiveness argument is that if the compelling state interest is to compensate victims of crimes out of the proceeds of the sale of stories of their victimization before anyone else benefits, the statute narrowly is drawn to do just that. The general expertise derived by a thief from a series of thefts is not the same as the tale of a specific theft committed against an identifiable victim. Payment for expertise, royalties from books that do not describe crime victims, and other income and assets of criminals may be reached in other ways. Section 632-a deals with readily identifiable, locatable funds that are most commonly available to those who victimize others.

The overinclusiveness of the statute is said to lie in its application to books in which particular crimes constitute only a small part of the subject matter, in its application to the entire proceeds due the criminal author from each book covered, and in reaching payments that constitute compensation for the labors of authorship rather than the property of the victim or the fruits of unjust enrichment. These claims of overinclusiveness must be rejected. Section 632-a does not eliminate a criminal's right to speak about a crime, nor does it prevent all payment for the story of the crime. It merely serves to tie up the proceeds of the story until the victim is able to get the first crack at the fund. This is no more than is required by the compelling state interest we have identified. That interest requires that the entire proceeds due the criminal be available to the victim, whether or

not the victim's story is a small or large part of the book. The income is derived from the notoriety of the criminal rather than from his or her labors. When that notoriety comes at the expense of a victim in need of compensation and restitution, the income so derived should be available to the victim.

CONCLUSION

We conclude that section 632-a meets the strict scrutiny test of constitutionality and affirm the judgment of the district court.

JON O. NEWMAN, *Circuit Judge*:

There are times when well-intentioned legislators, acting for the best of reasons, enact a statute that violates the Constitution. When that occurs, courts are challenged to resist the passions of the moment that swayed the legislators and to apply the paramount restrictions of the Constitution. This case presents such a challenge.

The New York legislature, responding to the public outrage over the 1977 "Son of Sam" murders and to the prospect that the killer, when apprehended, might write a book about his crimes, enacted a statute intended to prevent criminals from profiting from their crimes. *See* N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1990). That laudable purpose, which New York is free to carry out in a variety of ways, including comprehensive victim restitution provisions, resulted in a statute that violates the First Amendment. Because the Court upholds the statute, thereby impairing First Amendment

protections and depriving the public of valuable writings about activities of high public interest, I respectfully dissent.

All members of the panel are in agreement that section 632-a imposes such a direct burden on free expression that its constitutionality is to be tested under standards of "strict scrutiny." *See Meyer v. Grant*, 486 U.S. 414 (1988). We also agree that among the components of the strict scrutiny standard in the area of free expression are requirements that the challenged statute is narrowly tailored to advance important governmental interests and that any distinction made by the statute concerning speech in general or speech of particular content must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). We disagree on whether section 632-a meets these exacting tests.

The application of the statute only to speech, and, more significantly, only to speech of specified content, is beyond dispute. The statute does not require that all payments to criminals be escrowed for the benefit of crime victims; it applies only to payments made to those who write books or use other forms of communication. And, rather than apply to all payments to criminals who write books, it applies only to those payments made to criminals who write books in which they express "thoughts, feelings, opinions, or emotions" regarding their crimes. N.Y. Exec. Law § 632-a(1). The opportunity to sell books on a variety of other topics, enhanced for many criminals by the fame resulting from their crimes, is not disturbed by this statute. Thus, John Ehrlichman can write novels with no concern that his

royalties, doubtless augmented by the fame attending his Watergate crimes, will be held for five years to pay claims of victims or other creditors. The content-based application of the statute is vividly illustrated by the decision of the New York Crime Victims Compensation Board, which administers the statute, to apply it to Jean Harris's autobiography, *Stranger in Two Worlds*, because two chapters, containing primarily testimony from her trial, referred to her crime. *See Children of Bedford, Inc. v. Petromelis*, 143 Misc. 2d 999, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Cty. 1989), *aff'd*, 556 N.Y.S.2d 483 (1st Dep't 1990). Had the book concerned exclusively conditions at Bedford Hills prison, Harris's royalties, though enhanced by the notoriety of her crime, would not have been escrowed for the family of her victim.

The Court responds to the content-based discrimination of section 632-a in two ways, neither of which, in my view, is valid. First, the Court applies a legal analysis that defines the state interest being advanced in terms of the statute's scope, thereby reaching the circular result that the scope of the statute is precisely tailored to the state's objective. But the question in all such cases is whether a state, consistent with the First Amendment, can pursue its objective by focusing on speech of particular content. New York is entitled to escrow for the benefit of crime victims *all* payments to criminals. The question is whether it can escrow only payments to criminals who write books and, even if that is so, whether it can escrow only payments to criminals who write books about their crimes. To say that New York can do so because escrowing this narrow category of payments benefits crime victims, an objective New York is anxious to achieve, eliminates the entire inquiry concerning the

validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech. It could have been said as easily in *Arkansas Writers* that the tax was valid because it achieved the state's objective of raising revenue from the category of publications within the statute's coverage. The Supreme Court, however, was not so easily satisfied, and the Arkansas tax statute that discriminated among types of publications was held to violate the First Amendment.

Next, the Court upholds the content-based discrimination on the factual ground that "as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes." ____ F.2d at ____. In the first place, I doubt that this assertion is true, and I am confident that it has not been established either in the record of this case or, if it is a legislative fact, in the proceedings of the New York legislature, which held no hearings on the "Son of Sam" law. Of all criminals who might be liable for restitution, many have assets independent of the proceeds of their crimes. Crime is not exclusively an activity of the poor. And many poor criminals whose crimes involve the taking of property have at least some of that property available for restitution when they are arrested. Thus, I think it unlikely that the opportunity to write about their crimes is the sole or even principal asset of most criminals. My guess is that very few criminals have a crime story worth selling and that their number is far less than the sum of criminals with assets independent of their crime proceeds plus impoverished criminals in possession of such proceeds when arrested.

Second, and more fundamentally, even if it were true that the sole asset of most criminals is the right to tell the story of their crime, that observation would not validate New York's content-based regulation of speech. A state cannot select speech of a particular content for regulation just because such speech is a major part of an area of relevant activity that the state has elected not to regulate in full. The tax on a particular category of publications invalidated in *Arkansas Writers* would not have been saved from invalidation under the First Amendment even if the taxable revenues of the covered publications had accounted for most of the taxable revenues of all publications.

Recognizing that a content-based discrimination cannot be upheld if a legitimate state objective can be achieved by reasonably available alternative means, the Court rejects the possibility of using New York's attachment laws to secure for crime victims all profits realized by criminals, including book profits. This rejection rests on the view that New York's attachment remedies are currently too limited to be used by many crime victims. If that is so, the answer required by the First Amendment is to broaden the remedies, not to select books about crime for special regulation.

To whatever extent the majority relies on a state interest in assuaging the discomfort of victims distressed that a criminal is profiting from his crime, that interest is unavailing for several reasons. First, alleviating public outrage is not an interest that the First Amendment permits government to advance by regulating books and other forms of expression. *See Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988). Second, though the

New York statute deters the publication of crime accounts by those who commit or are only accused of committing crimes and will result in preventing publication of some accounts, it does not prohibit such writings. Publishers who can find people willing to have their advance royalties escrowed for five years can still publish accounts of crime written or facilitated by the accused, and victims will still be distressed by knowing that criminals have pocketed all profits remaining after claims of victims and other creditors. Finally, the "victim outrage" interest suffers from the same defect as the "victim compensation" interest—though the interest can be validly advanced by regulating all profits of crime, it cannot be advanced, consistent with the First Amendment, by singling out books of specified content for special regulation.

In addition to the fundamental vice of a content-based regulation of speech that is underinclusive, other aspects of section 632-a render it highly offensive to the First Amendment. Subsection 632-a(1) requires a publisher to submit to the Board all contracts and payments for books within the scope of the statute to be written by those *accused* of crime, not just those convicted. Though escrowed funds will be returned in the event of an acquittal, the statute deters, and in many cases prevents, the payment of advances for covered books to all persons accused of crime, even those later determined to be innocent. Many publishers will decline to make advance payments, rather than take the risk that the author claiming to be innocent will be convicted. From the undisputed affidavits in this case, it is clear that the prohibition of such advances will deter the writing of books by many innocent persons falsely accused of crime.

Another vice of the statute is the interpretation, applied by the Board in this case, that makes a publisher liable for any payments made to an author that are later determined to be covered by the statute in the event that the author declines to turn over the payments to the Board. That threat of a retroactive liability will make publishers extremely reluctant to make advances for books even arguably within the scope of the statute, a reluctance that, according to the undisputed affidavits, has already led to decisions not to publish books of high public interest.

Furthermore, the statute's coverage of contracts and payments for books that include only a brief reference to an author's crime or even to his "thoughts" about his crime will inevitably tend to impel publishers to purge manuscripts of all material arguably within the scope of the statute in order to escape its coverage and the risk of retroactive liability. The undisputed affidavits report that this has already occurred. Such governmentally induced suppression of speech is anathema to the First Amendment.

New York understandably wishes to make sure that crime victims receive restitution from those who perpetrate crimes. To achieve that objective New York has enacted a comprehensive restitution statute, authorizing sentencing judges in every case to order restitution. N.Y. Penal Law § 60.27 (McKinney 1987). Nothing in the Constitution prevents enactment of such a comprehensive statute providing for restitution to crime victims. If that statute needs strengthening to increase its effectiveness, New York is free to adopt needed reforms. However, when New York, understandably outraged by the prospect that a criminal might profit from a book about

his crime, tries to enact a victim restitution statute that applies only to protected speech, rather than all income-producing activity, and, then, only to speech of specified content, rather than all speech, it encounters First Amendment obstacles that in my judgment are insuperable.

Moreover, this statute is ill suited even to its objective of aiding victims. In the first eleven years of its operation, it has produced just five escrow accounts, three of which involved the same criminal. What little benefit to a handful of victims has thereby been achieved is more than offset by the royalties that would have been earned on books that were not published because of this statute. Such royalties would have been available for victim restitution under New York's existing restitution statute, which is not confined to books, much less to books with specified content.

The issue of how best to secure restitution for crime victims involves policy judgments for the state legislature. Whether this statute employs a technique permitted by the First Amendment, however, is an issue ultimately to be decided by the judiciary. Any statute that has the obvious effect of preventing the publication of matters of legitimate public interest is constitutionally suspect. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). We do not know how many books will not be published because of the existence of the challenged statute. *Wiseguy*, the book at issue in this case, and its film adaptation, *GoodFellas*, may not be profound additions to public understanding of crime, but they are significant contri-

butions. The evidence is undisputed that observance of the requirements of the "Son of Sam" law when the book contract was first negotiated would have prevented the writing of this book. And its publisher does not engage in hyperbole by inviting us to consider whether it or any other firm would have published *Where Do We Go From Here?* by Martin Luther King, Jr., *Witness* by Whitaker Chambers, or *On Civil Disobedience* by Henry David Thoreau, had the crimes of these authors been committed in New York State while section 632-a was in effect.

From the judgment upholding the constitutionality of section 632-a, I respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SIMON & SCHUSTER, INC.,

Plaintiff,

- against -

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS, individually and in their official capacities,

Defendants.

87 Civ. 5582 (JFK)

OPINION AND ORDER

JOHN F. KEENAN, United States District Judge

Before the Court are plaintiff's motion and defendants' cross-motion for summary judgment. Fed. R. Civ. P. 56. Plaintiff Simon & Schuster, Inc. ("Simon & Schuster") seeks an order declaring that New York Executive Law section 632-a violates the First and Fourteenth Amendments to the United States Constitution. The Court has heard oral argument on these motions and has received numerous briefs of *amici curiae*.

BACKGROUND

At issue in this action is New York Executive Law section 632-a, commonly referred to as the "Son of Sam" law. Enacted in 1977, the purpose of section 632-a is to prevent those accused or convicted of a crime from profiting from the commercial exploitation of their crimes by contracting for the production of books, movies, magazine articles, television shows and the like in which their crime is reenacted or in which the "person's thoughts, feelings, opinions or emotions" about the crime are expressed.

The facts of this case are undisputed. In 1980, career criminal Henry Hill was arrested and charged with six counts of conspiracy to sell drugs. In 1980, Hill began to cooperate with the

Government and was put into the Federal Witness Protection Program. In 1981, Simon & Schuster began efforts to publish a book with Hill's cooperation, which would provide an inside look at organized crime in New York City. Simon & Schuster's Editor in Chief, Michael Korda, contacted the Sterling Lord Agency ("Sterling Lord"), a literary agency in New York, to find an author for such a book. The parties obtained the services of Nicholas Pileggi, a well-known author who had previously written magazine articles on organized crime and municipal corruption. On August 21, 1981, Pileggi, Hill and Sterling Lord entered into a written agreement for the creation of the book. On September 1, 1981, Simon & Schuster, Pileggi and Hill entered into a publishing agreement ("the Contract") for an autobiographical non-fiction work based on organized crime in New York City. Simon & Schuster was to pay money to Sterling Lord for the benefit of Pileggi and Hill, and the money was to be divided between Pileggi and Hill. Sterling Lord was to receive 10% of the money paid to Pileggi and Hill. The result of these transactions was *Wiseguy: Life in a Mafia Family*, which was published in January 1986 and which subsequently appeared on several best-seller lists.

By letter dated January 31, 1986, defendant the New York State Crime Victims Board ("the Board") directed Simon & Schuster to provide it with a copy of the Contract and to suspend payments to Sterling Lord. Simon & Schuster complied. On June 15, 1987, the Board served on Simon & Schuster a Proposed Determination and Order and informed Simon & Schuster of their right to a hearing. No hearing was requested by Simon & Schuster,[1] and the Proposed Determination and Order became final on July 15 1987.

The Order concluded that *Wiseguy* was subject to the regulations promulgated in section 632-a, because the book contained Hill's thoughts, feelings, opinions and emotions about

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1 Sterling Lord, however, did submit objections to the Proposed Determination and Order and requested a hearing. Petromelis Aff. ¶ 34, 35.

and admissions to his participation in criminal activities. The Board described *Wiseguy* as

> Henry Hill's life story from 1955 when he first became involved with organized crime until May 1980 when he joined the Federal Witness Protection Program. It is a veritable catalog of crimes in which Henry Hill admits to the commission of various crimes and expresses his feelings, opinions or emotions regarding such crimes.

Plaintiff's Notice of Motion, Exh. 2, ¶ 11. As a result of its review, the Board found that Simon & Schuster had violated section 632-a; a copy of the Contract should have been turned over to the Board at the time of execution for its determination as to the applicability of section 632-a. The Board found that Pileggi was a co-author, not a representative of Hill, thus he was not subject to section 632-a. Sterling Lord was found, however, to be an agent of Hill and therefore a representative under section 632-a, and was ordered to turn over to the Board its 10% share of Hill's proceeds. The Board also ordered Hill to turn over to its escrow account any money paid to him by Simon & Schuster through Sterling Lord, totaling $96,250.00. If Hill failed to turn over the money, Simon & Schuster was ordered to pay that amount to the Board. In addition, Simon & Schuster was ordered to turn over all outstanding money payable to Hill, including any future royalties payable to Hill or his representatives under the Contract.

Plaintiff then brought this action seeking declaratory and injunctive relief, asserting that section 632-a violates the First Amendment guarantee of freedom of speech and is unnecessarily vague and overbroad in violation of the Fourteenth Amendment. Plaintiff further alleges that section 632-a impairs its ability to undertake publishing contracts that arguably fall within the statute's reach. The statute thus has a chilling effect in that books concerning crime, about which the public has a right to know, will not be published. In addition, plaintiff argues that section 632-a affects

editorial decisions and will result in self-censorship of certain subjects.

DISCUSSION

A. Legislative History of Section 632-a

The legislative history of section 632-a has been thoroughly recounted in *Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (2d Dept. 1979), and will be summarized for purposes of this discussion. New York Executive Law, Article 22, sections 620-635, was enacted in 1966 and is entitled "Crime Victims Board." Section 620 contains a "Declaration of policy and legislative intent," which reads as follows:

> The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent upon public assistance. The legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.

Section 622 creates a Crime Victims Compensation Board, section 623 delineates the powers of the Board, and section 629 provides the method for judicial review of the Board's decisions. Rules and regulations promulgated by the Board are set forth in Title 9 of New York Code of Rules and Regulations, Parts 525, 526 and 527.

Section 632-a was enacted in 1977 and is entitled "Distribution of Moneys Received as a Result of the Commission of a Crime." Section 632-a provides that any payments made to a criminal pursuant to a contract for the reenactment of his or her

crime through a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, be put into escrow for five years. Victims of the reenacted crime are then given five years from the creation of the escrow account in which to bring a civil action and recover a money judgment against the criminal or his representatives. *See Barrett*, 66 A.D.2d at 615, 414 N.Y.S.2d at 357. The money is held in escrow in order to ensure that the assets are preserved and that the victim's money judgment will be satisfied.

The motivation behind the enactment of section 632-a was the highly publicized sale by David Berkowitz, the "Son of Sam" serial killer, of the exclusive rights to the story concerning his crime. The bill's sponsor, New York State Senator Emmanuel R. Gold, stated,

> It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four calibre killer, can expect to receive large sums of money for his story once he is captured–while five people are dead, other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.

N.Y. Legis. Ann., 1977, at 267. *See Riggs v. Palmer*, 115 N.Y. 506 (1889) (old maxim that no one should be permitted to profit from his own crime).

It is no secret that section 632-a was enacted in hasty response to the public outcry that ensued after the David Berkowitz sale was publicized. *See Matter of Johnsen*, 103 Misc. 2d 823, 824, 430 N.Y.S.2d 904, 906 (1979). The statute has, however, been amended since its enactment. In 1978 and 1981 section 632-a was amended to clarify substantive ambiguities. L. 1978 ch. 417,

eff. Sept. 1, 1978; L. 1981 ch. 445, eff. July 7, 1981. *See Barrett*, 66 A.D.2d at 611-12, 414 N.Y.S.2d at 355. And in 1986 the legislature again made amendments to correct spelling errors and to revise subsection 11, which provides for priority of payments from the escrow account. L. 1986, c. 74, § 6.

To date, some twenty-nine other states have enacted legislation restricting revenue from crime-related books and movies. The majority of these laws are modeled after section 632-a. *See* 60 ALR 4th 1210, § 2 (listing Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Ohio, Oklahoma, Michigan, Nebraska, Nevada, New Jersey, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington and Wisconsin). In addition, state courts in New York and New Jersey have upheld the constitutionality of "Son of Sam" laws. *See In the Matter of Application of Children of Bedford, Inc.*, 541 N.Y.S.2d 894 (Sup. Ct. 1989); *Matter of Johnsen*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (Sup. Ct. 1979); *Fasching v. Kallinger*, 211 N.J. Super 26, 510 A.2d 694 (N.J.), *rev'd on other grounds*, 222 N.J. Super. 270, 546 A.2d 1094 (1988).

The fact that section 632-a and an analogous "Son of Sam" law have been found constitutional by some courts and that section 632-a has served as a model for a large number of states is indicative of the law's general acceptance in this country's legislatures and courts. Its acceptance, however, is not dispositive of its constitutionality. It is helpful to defendant's position, however, that at this time the interpretation of section 632-a is not in disarray. In addition, both parties to this action agree that the law's purpose, the compensation of crime victims, is a good one and should be furthered. The question before this Court, then, is whether this particular law is the proper method to further that purpose, and if so, whether this law is constitutional on its face and in its application.

B. First Amendment

Plaintiff asserts that section 632-a imposes unconstitutional restrictions on authors and publishers of books on crime. Plaintiff contends that section 632-a is content-based, speaker-based, that the press gets differential treatment under the statute, and that section 632-a forces editors to alter books in order to avoid the statute's restrictions, thus resulting in self-censorship. Finally, it is urged that publishers are unlawfully required to seek prior review from governmental officials before accepting a book for publishing. Plaintiff thus submits that section 632-a imposes impermissible restrictions on the First Amendment's guarantee of free speech and therefore must meet a test of strict scrutiny. The strict scrutiny test requires a showing of compelling state interest and a law narrowly tailored to fit that interest. Plaintiff argues that the mere fact that the law was passed for a beneficent purpose, compensating crime victims, does not fulfill the strict scrutiny test.

The Board responds that section 632-a does not implicate freedom of expression and that the First Amendment is not implicated at all. Accused or convicted criminals are free to write, but they are unable to directly receive profits. Section 632-a thus regulates the author's non-expressive activity rather than prohibits the author's expression. Finally, the Board asserts that the law imposes only an indirect burden on the press' ability to publish or upon an individual's decision to express his views. The Board thus submits that it is acting within constitutional restraints under section 632-a.

The Court is acutely aware of its responsibility to afford great deference to the state legislature in its law-making function. As the Supreme Court has directed, "In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary." *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3269 (1984).

This caution is tempered, however, by the Supreme Court's recognition that with legislation concerning First Amendment freedoms "precision of drafting and clarity of purpose are essential." *Erznoznik v. City of Jacksonville*, 95 S. Ct. 2268, 2277 (1975). *See also Sable Communications of California, Inc. v. Federal Communications Commission*, 109 S. Ct. 2829, 2838 (1989) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." (quoting *Landmark Communications, Inc. v. Virginia*, 98 S. Ct. 1535, 1543 (1978)).

The Court must first determine whether the effect of section 632-a is to restrict expressive activity or whether its effect is merely to regulate the proceeds of that expressive activity.[2]

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2 Defendants urge the Court to classify plaintiff's activities, writing and publishing books, as commercial speech which is not automatically protected by the First Amendment. Defendants base their assertion on plaintiff's theory that people will not write books on crime if they are not certain of prompt payment. Defendants argue, then, that writing books concerning crime is motivated solely by financial considerations and therefore is a form of commercial speech. The Court disagrees with defendants' position and has found no authority to this effect. Courts have held consistently that the mere fact that there is an economic motivation in a person's activity does not turn the person's activity into commercial speech. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940). It would be absurd for this Court to deny First Amendment protection to the activities of book publishers and to classify books among activities such as advertising which do "no more than propose a commercial transaction." *Bolger*, 463 U.S. at 66 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S 748, 762 (1976)). *See* (continued...)

Once this determination is made, the Court must then decide whether to apply a standard of strict scrutiny or a lesser standard in determining the constitutionality of section 632-a.

Simon & Schuster alleges that section 632-a has a restrictive impact on First Amendment interests, and that the effect is to inhibit or prevent the publication of works of major importance which involve the subject of crime.[3] Plaintiff submits affidavits of people involved in the publishing business who allege that section 632-a "interferes with the publishing and editorial decisions of publishers and writers, and diminishes the amount of protected expression reaching the reading public by deterring the commissioning and publication of works to which it applies." Simon & Schuster Mem. at 14.

The Court recognizes that section 632-a does act as a procedural hurdle in the publishing process. Publishers may have to search harder for an accused or convicted criminal who is willing to sell his or her story without the promise of immediate payment. *See Meyer v. Grant*, 108 S. Ct. 1886, 1893 (1988) ("it is often more difficult to get people to work without compensation than it is to get them to work for pay"). But it is well accepted that freedom of speech "presupposes a willing speaker." *Virginia*

2(...continued)
also Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (profit motive of media does not make First Amendment inapplicable).

3 Simon & Schuster asserts that many of the following books would not have been written if section 632-a had been in effect at the time of their writing: *Autobiography of Malcolm X*, Martin Luther King Jr.'s, *Where Do We Go From Here?*, Henry David Thoreau's *On Civil Disobedience*, Eldridge Cleaver's *Soul on Ice*, Norman Mailer's *The Armies of the Night*, Jean Genet's *A Thief's Journal*, Whitaker Chamber's *Witness*, John Dean's *Blind Ambition*, and John Erlichman's *Witness to Power*.

State Board of Pharmacy, 425 U.S. at 756. Thus, although it may be more difficult for publishers and authors to create books with the cooperation of a criminal source, it is not impossible nor is such cooperation proscribed by section 632-a. The statute merely diverts the criminal source's proceeds for a time to ensure that victims may be compensated. *See Children of Bedford*, 541 N.Y.S.2d at 899.

In the instant case, *Wiseguy* was written, published and sold to thousands of readers. The Board's ruling occurred after the book's publication, resulting in the seizure of Hill's proceeds[4] and those received by Sterling Lord as Hill's representative. Pileggi and Simon & Schuster were permitted to retain their proceeds. Simon & Schuster suggests that had the Board reviewed the Contract before the book's publication, Hill never would have cooperated and thus the public would have been denied the opportunity to read this book. However, because Simon & Schuster failed to comply with section 632-a by presenting its Contract with Pileggi and Hill to the Board before making payments to Hill, we will never know whether or not Hill would have cooperated.[5]

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4 Because section 632-a's application is limited to the proceeds of expressive activity, plaintiff argues that the statute is under-inclusive. Plaintiff would like the statute to affect all of the criminal's assets. The Court is uncertain why plaintiffs present this argument. It seems that a statute that attached all of the assets of a criminal would also have the alleged effect of deterring the writing of books, which plainitff predicts. This argument is less than helpful.

5 As is demonstrated by the Board's review of the application of the subway gunman Bernhard Goetz for a determination as to whether section 632-a applies to him, a crime which is determined to be "victimless" is one which avoids the restrictions of the law. *See* Simon & Schuster Reply Mem., Exh. B. Simon (continued...)

In this regard, Simon & Schuster argues that publishers are unlawfully required to seek prior review from government officials before making payments under a publishing contract. The Court finds that the Board's review is not unlawful and that it does not prohibit expression. The Board merely determines whether section 632-a applies to a contract. It does not determine the newsworthiness or the educational value of a work. *See Regan v. Time, Inc.*, 468 U.S. 641 (1984) (regulation prohibited photographic reproductions of U.S. currency unless found to be of newsworthy or educational value); *Erznonik v. City of Jacksonville*, 422 U.S. 205 (1975) (ordinance prohibited showing of nude films at drive-ins); *Carlin Communications, Inc. v. Federal Communications Commission*, 749 F.2d 113 (2d Cir. 1984) (scheme for blocking dial-a-porn phone calls during certain hours found both under-inclusive and over-inclusive), *cert. denied*, 109 S. Ct. 305 (1988). Nor does section 632-a prohibit speech. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980) (impermissible suppression of telephone bill inserts concerning controversial issues of public importance); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (restrictions on charitable solicitations prevented persuasive speech on causes of economic, political concern); *Buckley v. Valeo*, 424 U.S. 1 (1976) (limitations on expenditures by political candidates on own behalf restricted political speech); *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988) (statute unlawfully prohibited all exit polling).

In its surreply memorandum, Simon & Schuster argues that the Supreme Court's decision in *Meyer v. Grant*, 108 S. Ct. 1886 (1988), "squarely reaffirms that a direct restriction on the ability to use non-governmental monies to pay for an activity is tantamount to a direct restriction on that activity, and must be scrutinized accordingly." Simon & Schuster Surreply Mem. at 5.

5(...continued)
& Schuster's vehement references to what "might not" be published are thus purely conjectural.

Simon & Schuster stresses a quote from *Meyer* which at first glance appears to be quite helpful to plaintiff: "the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue." *Id.* at 1892. A closer look at *Meyer*, however, shows that it is clearly distinguishable. At issue was a statute which permitted proposals for state constitutional amendments to be placed on the general election ballot if at least 5% of the total number of qualified voters signed a petition for the amendment. The statute, however, made it a felony to pay petition circulators. The Supreme Court held the statute unconstitutional in that it abridged the right to engage in political speech which is at the "core" of the First Amendment. Such a limitation on political expression subjected the statute to "exacting scrutiny." The statute thus operated directly to affect political speech. Here, section 632-a has no abridging effect on political speech. It merely functions to prevent criminals from capitalizing on their crimes.

The Supreme Court has recently found that "where speech and nonspeech elements are combined in the same course of conduct a sufficiently important governmental interest in regulating the nonspeech element can justify **incidental limitations** on First Amendment freedoms." *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989) (emphasis added) (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). Section 632-a applies to situations in which speech and nonspeech elements are combined. Although it applies only to contracts with respect to the expression of the criminal's feelings about or recollection of his or her crime, the statute's reach is not prohibitive of the expressive activity. The effect is limited to the nonexpressive element of the activity: receiving a profit. Defendants correctly rely on *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172 (1986), to illustrate this concept. In *Arcara*, an anti-prostitution statute was used to close a bookstore in which prostitution was being practiced. The bookstore owners argued that the First Amendment prohibited the store's closing because the statute burdened their book-selling activities. The Court noted that the booksellers were free to sell their books elsewhere and that "every civil and criminal remedy imposes some conceivable burden on

First Amendment activities." 106 S. Ct. at 3177. *See also Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 586 (1983) (neither press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities).

The state's interest in compensating crime victims is unrelated to the suppression of free expression and any burden on free expression is merely incidental. Section 632-a is not designed to suppress speech which it finds abhorrent or obscene, *see Sable Communications, Inc.*, 109 S. Ct. at 2836, or that the community is simply hostile to. *See Texas v. Johnson*, 109 S. Ct. at 2541. The speech itself is not the target of section 632-a; the profit-making aspect is the target. It is not necessarily abhorrent to the public to read about Hill's activities as a mobster. To many, that is a source of interest and of news value. The clearly abhorrent and repulsive aspect is that with the admission of his crimes, Hill is able to profit. The Court finds that the statute does not reflect legislative hostility to the viewpoint of an author who writes about criminal activity. The only questions for the Board in its review of a publishing contract are:

1. Is the speaker an accused or convicted criminal?

2. Does the book discuss the accused or convicted criminal's crime?

3. If the speaker is not accused or convicted, does the book contain admissions to the commission of a crime?

4. Does a victim(s) to the discussed crime(s) exist who could obtain a civil judgment against the speaker?

The Board does not employ a sliding scale to determine if the crime spoken of is more horrible than another. *See Young v. American Mini Theatres*, 427 U.S. 50, 67 (1976). All crimes for which there are victims are covered by section 632-a. This purely objective inquiry illustrates the non-hostile functioning of section 632-a.

Simon & Schuster also argues that section 632-a is speaker-based. Plaintiff relies on clearly distinguishable cases. In *First National Bank of Boston v. Bellotti*, 98 S. Ct. 1407 (1978), at issue was a Massachusetts statute that prohibited corporate bodies from making campaign contributions that would influence the vote on any question except one materially affecting the property, business, or assets of a corporation. The statute was held unconstitutional in that it prohibited certain speakers from expressing views on political issues. The Court held that "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.* at 1420. (citing *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). In *Bellotti*, the statute prohibited corporate speakers from addressing the public on an issue of public concern, which is different from the instant case. Likewise, in *Federal Communications Commission v. League of Women Voters*, 104 S. Ct. 3106 (1984), the Supreme Court held unconstitutional a statute which forbade a noncommercial educational broadcasting station which receives a grant from the Corporation for Public Broadcasting to "engage in editorializing." The statute was held unconstitutional in that it acted as a ban on editorializing and thus violated the First Amendment. Once again, section 632-a does not ban speech; it does not evaluate the expressions of criminal speakers based on a subjective standard; and its purpose is not to prohibit or unduly burden the dissemination of a particular type of speech.

Based on the foregoing, the Court finds that section 632-a does not directly affect expressive activity and that it is directed at nonspeech activity. As a result, the Court need not apply a test of

strict scrutiny to the statute. Instead, section 632-a is subject to the lesser standard of review as dictated by the Supreme Court in *O'Brien*. In *O'Brien*, the Supreme Court upheld a statute which criminalized the destruction of Selective Service certificates. The Court found that the destruction of the certificates was not expressive activity and that the statute was directed at nonspeech elements. The Court held that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," and that the statute was constitutional if it had been enacted within the constitutional power of the government, furthers an important or substantial governmental interest unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedom is no greater than is essential to that governmental interest. *See O'Brien*, 391 U.S. at 376. The standard in *O'Brien* is a lesser standard than the strict scrutiny test advocated by plaintiff, which requires that the statute serve a compelling interest and that the statute be narrowly tailored to achieve the government's goals.

Applying *O'Brien* to section 632-a, the Court finds first that the New York state legislature acted within its authority in enacting the statute. Both parties agree that victim compensation is necessary and that the most effective means of compensating crime victims should be developed. Related to this authority, then, is the important governmental interest of victim compensation. The Court has determined that this interest is unrelated to the freedom of expression. As has been discussed, the interest in compensating victims does not involve suppressing speech, but merely attaching the proceeds of that speech for the benefit of the victim.

Finally, the Court finds that any incidental restriction on First Amendment freedom imposed by section 632-a is no greater than is essential for the government's interest in compensating crime victims. The law is drawn not to prohibit expressive activity, but to garnish the proceeds so that they will be used in a productive manner. The statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from

directly profiting from his or her crime. The Court thus finds that section 632-a withstands the *O'Brien* test and that it is not unconstitutional on its face nor as applied to plaintiff.

C. Fourteenth Amendment

Simon & Schuster also argues that section 632-a violates the Fourteenth Amendment in that it is overbroad and vague. Simon & Schuster asserts that "[t]he blunderbuss breadth of the statute and the resulting uncertainties" give the Board the power to make enforcement decisions "without clear, neutral standards." Simon & Schuster Mem. at 64. Plaintiff relies heavily on *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 107 S. Ct. 2568 (1987). At issue in that case was a resolution adopted by the Board of Airport Commissioners banning "all First Amendment activities" within the central terminal area at Los Angeles International Airport. The Supreme Court found the statute to be impermissibly broad in that its sweeping ban would prohibit virtually all protected expression. The court found that every person in the airport conceivably could be held in violation of the statute and that "no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 2572.

Plaintiff argues that *Jews for Jesus* is on point because section 632-a applies to "every" contract or payment "with respect to" the enactment of a crime in any medium regardless of how long ago the crime occurred, or the relative importance of the crime to the book. Simon & Schuster Mem. at 60. In addition, Simon & Schuster argues that the lack of clear standards gives the Board open-ended discretion in determining the enforcement of section 632-a.

The Court finds that plaintiff's reliance on *Jews for Jesus* is misplaced. The resolution at issue in that case was indeed sweeping, overbroad and subject to discretionary enforcement. Section 632-a, however, sets forth its scope in readily discernible language. Section 632-a may not be the most carefully drafted

statute ever passed by the New York State legislature, but the constitution does not require "meticulous specificity" in order for a statute to survive a void for vagueness challenge. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). The Fourteenth Amendment requires that due process be afforded in that laws provide fair warning to those within its scope, that clear standards for enforcement of the law exist, and that no law should inhibit the exercise of basic constitutional freedoms. *See Id.* at 108-09.

An inspection of the language of section 632-a indicates that plaintiff's argument must fail. First, the statute clearly delineates its application to anyone who contracts with a person "accused or convicted of a crime in this state." Section 632-a(1). "Convicted person" is further defined as "any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person was not prosecuted." Section 632-a(10)(b). Section 632-a also sets forth when the statute applies. It is applicable to any contract entered into with such convicted person with respect to "the reenactment of such crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime." Section 632-a(1). Finally, section 632-a delineates how a covered person may comply with its requirements. The statute directs such contracting person to "submit a copy of such contract to the board to pay over to the board any moneys which would otherwise, by the terms of such contract, be owing to the person so accused or convicted or his representatives." Section 632-a(1).

Plaintiff cannot argue that it was unaware that Hill fell under the application of section 632-a. *Wiseguy* was written in order to obtain an "inside look" at organized crime in New York City. Hill was known to be a long-time participant in organized crime and Simon & Schuster actively pursued his "thoughts,

feelings, opinions [and] emotions" regarding such crime. *See* Korda Aff. ¶¶ 3-6; Pileggi Aff. ¶¶ 2-4. Simon & Schuster's argument that section 632-a may apply to other expressive works that are less obvious that Hill's lacks merit. *See supra* note 5. There is no indication that section 632-a has been applied arbitrarily. The Board's determination that section 632-a did not apply to Bernhard Goetz was consistent with his acquittal on all counts but one--criminal possession of a weapon in the third degree, a class D felony. Penal L. § 265.02(4). In addition, the Board's determinations have been upheld in all but one instance. *See In re Robert Halmi, Sr.*, 128 A.D.2d 411, 512 N.Y.S.2d 650 (1st Dept. 1987).

The Court finds that section 632-a meets constitutional muster. The statute provides fair notice to those to whom it applies, it provides guidelines for compliance, and, as the Court's discussion indicates, *see supra* Part B., the statute does not inhibit the exercise of basic constitutional freedoms.

CONCLUSION

Based on the above analysis, the Court denies the plaintiff's motion for summary judgment and grants defendant's cross-motion for summary judgment. Section 632-a is constitutional under the First and Fourteenth Amendments. The Complaint is ordered dismissed, and this case is removed from the active docket of this Court.

SO ORDERED.

Dated: October 24, 1989
New York, New York

/s/

JOHN F. KEENAN
United States District Judge

Before the
STATE OF NEW YORK
CRIME VICTIMS BOARD

In the Matter of a Contract

Between

HENRY HILL and NICHOLAS PILEGGI
and SIMON & SCHUSTER

NOTICE OF PROPOSED

DETERMINATION AND ORDER

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

PLEASE TAKE NOTICE that the Crime Victims Board, State of New York has issued, pursuant to Executive Law 632-a and 9 NYCRR 526.1, the Proposed Determination and Order affixed hereto in the above-captioned matter.

This Proposed Determination and Order will become final within thirty (30) days of the date of service of this notice unless a hearing is requested in writing by an interested party. If you disagree with the Proposed Determination and/or Order, you have the right to a hearing before the Crime Victims Board prior to a final determination in this matter. A request for a hearing must be made in writing addressed to: Chairman, New York State Crime Victims Board, 97 Central Avenue, Albany, New York 12206. The request should state the reason for your disagreement with the Proposed Determination and/or Order, and your interest in the matter.

Dated: May 27th, 1987
Albany, New York

Yours very truly,

Lorraine Felegy, Counsel
New York State
Crime Victims Board
97 Central Avenue
Albany, New York 12206
518/473-9649

Before the
STATE OF NEW YORK
CRIME VICTIMS BOARD

In the Matter of a Contract

Between

HENRY HILL and NICHOLAS PILEGGI
and SIMON & SCHUSTER

PROPOSED

DETERMINATION AND ORDER

FINDINGS OF FACT

1. On or about April 27, 1980 Henry Hill was arrested in Nassau County and was charged in six indictments numbered 50764-50769 with Conspiracy to Sell Drugs.

2. In May 1980, Henry Hill entered into the federal witness protection program in exchange for his agreement that he would cooperate with various law enforcement agencies.

3. In the interest of justice the six indictments against Henry Hill were dismissed.

4. Simon & Schuster is a for-profit corporation doing business in New York State with offices located in New York City and is in the business of publishing books.

5. The Sterling Lord Agency is a literary agency with offices at 660 Madison Avenue in New York City.

6. On September 1, 1981 Simon & Schuster and Henry Hill and Nicholas Pileggi entered into a Contract known as a Publishing Agreement (hereinafter the "Contract") , copy of which is annexed hereto as Exhibit "A".

7. Under the terms of the Contract, Henry Hill and Nicholas Pileggi (jointly referred to as "Author" in the Contract), sold exclusive publishing rights to a work entitled *Wiseguy*, to be authored by Henry Hill and Vincent Pileggi, to Simon & Schuster.

8. The Contract further provides for the payment of monies by Simon & Schuster to Author, to be divided between Henry Hill and Nicholas Pileggi, pursuant to a separate agreement.

9. On August 21, 1981 Henry Hill and Nicholas Pileggi entered into an agreement (hereinafter "Agreement") whereby all monies received in the sale of a book length manuscript concerning Hill's life, to be prepared cooperatively by Hill and Pileggi were to be divided between Henry Hill and Nicholas Pileggi according to specified percentages for printed page and performance rights. The Agreement further provided that the Sterling Lord Agency was to receive and retain ten percent (10%) of any and all monies payable to Henry Hill and Nicholas Pileggi in respect to said work. The Agreement is hereto annexed as Exhibit "B".

10. The work *Wiseguy* was published in 1985.

11. The work *Wiseguy* is Henry Hill's life story from 1955 when he first became involved with organized crime until May 1980 when he joined the Federal Witness Protection Program. It is a veritable catalog of crimes in which Henry Hill admits to the commission of various crimes and expresses his feelings, opinions or emotions regarding such crimes.

12. The Crime Victims Board first became aware of the possibility of a Contract between Henry Hill and Simon & Schuster in January, 1986.

13. On January 31, 1986 the Crime Victims Board by its Counsel sent certified letters to Simon & Schuster and Nicholas Pileggi requesting that a copy of the Contract and certain other information be turned over to the Crime Victims Board pursuant to Executive Law §632-a (hereby annexed as Exhibits "C" and "D").

14. On May 27, 1986 the Crime Victims Board received a letter from Simon & Schuster, signed by John C. Bender, Group Vice President and General Counsel (annexed hereto as Exhibit "E"), which enclosed a copy of the Contract (see Exhibit "A"), a copy of the Agreement between Henry Hill and Nicholas Pileggi (see Exhibit "B") and copies of two letter amendments to the Contract (annexed hereto as Exhibits "F" and "G").

15. Based on the correspondence received on May 27, 1986 from Simon & Schuster (see Exhibit "E"), payments in the amount of $96,250.00 were made to the Sterling Lord Agency for the account of Henry Hill.

16. At present Simon & Schuster is holding approximately $27,958.00 due to be paid to Henry Hill pursuant to the Agreement.

OPINION AND ORDER

1. The Contract between Henry Hill and Nicholas Pileggi and Simon & Schuster, dated September 1, 1981 is of the type regulated by Executive Law §632-a. As such a copy of such Contract should have been turned over to the Crime Victims Board in 1981 at the time of execution for the Board's determination as to whether it came within the ambit of the Statute. At the very least, a copy of the Contract should have been turned over to the Board prior to October 10, 1984 the date of the first payment by Simon & Schuster to Sterling Lord

Agency for the account of Henry Hill. The statute and rules of the Crime Victims Board provide ample means by which a publisher may obtain a determination from the Board regarding the applicability of Executive Law §632-a to a particular Contract. These procedures include a request for an Adjudicatory Ruling (9NYCRR §525.19) by which a publisher may obtain a binding ruling based on an actual or hypothetical set of facts, a request for an advisory opinion of Counsel based upon a stipulated set of facts or circumstances, or a request for a formal Proposed Determination and Order based on submission of an actual Contract and related information (9NYCRR §526.1). By failing to turn over a copy of the Contract to the Board and by paying $96,250 to Henry Hill without seeking any determination from the Board, Simon & Schuster violated Executive Law §632-a.

2. The Board has reviewed the book entitled *Wiseguy*, authored by Henry Hill and Nicholas Pileggi pursuant to the Contract and published by Simon & Schuster, in 1985, and is of the opinion that it contains thoughts, feelings, opinions and emotions regarding crimes committed by Henry Hill as well as his admission to involvement in such crimes.

3. Nicholas Pileggi is a co-author and is not a representative of Henry Hill within the meaning of Executive Law §632-a(1) and as such no monies due or owing him are subject to the mandates of Executive Law §632-a.

4. As the Board is of the opinion that the Contract as performed is of the type described in and governed by Executive Law §632-a, all monies paid to Henry Hill or his representatives under the Contract must be turned over to the Crime Victims Board to be held in escrow for the victims of crimes committed by Henry Hill.

5. The Sterling Lord Agency as an agent of Henry Hill is deemed a representative under Executive Law Sections 621(6) and 632-a, and must also turn over any monies received or to be received under the Contract on account of Henry Hill, to the Crime Victims Board. However, the Sterling Lord Agency may, pursuant to Executive Law §632-a(8) make application to the Board for payment of necessary expenses for the production of monies paid into the escrow account to be established by the Board in this case.

Accordingly, pursuant to Executive Law §632-a it is hereby

ORDERED that Henry Hill pay over to the Crime Victims Board all monies received under the aforementioned Contract, including but not limited to the payments already received under the Contract from the Sterling Lord Agency in the amount of $96,250 (less any agent fees paid to the Sterling Lord Agency under the Agreement between Henry Hill and Nicholas Pileggi), plus any interest which has accrued on such monies from the date of receipt, along with any and all future monies due him under the Contract, such monies to be deposited in an escrow account for the benefit of and payable to any victims or the legal representative of any victim of the crimes which he admits to committing;

ORDERED that in the event Henry Hill fails to turn over to the Board monies paid to him in the amount of $96,250 (minus agent fees paid to Sterling Lord Agency) plus interest within thirty (30) days after issuance of a Final Determination and Order of the Board in this matter, that Simon & Schuster, shall turn over to the Board the total of monies it wrongfully distributed to Henry Hill through the Sterling Lord Agency, in the amount of at least $96,250 (minus agent fees paid to Sterling Lord Agency) plus interest from the date of payment;

ORDERED that Simon & Schuster turn over to the Board forthwith any and all monies payable to Henry Hill now held by Simon & Schuster, including the $27,958 presently held, as well as any and all future royalties or other monies that would otherwise be payable to Henry Hill or his representatives under the Contract.

ORDERED that the Sterling Lord Agency pay over to the Board any monies received from Simon & Schuster under the Contract as agent and representative of Henry Hill, as well as any other past or future monies received or to be received from the Contract on account of Henry Hill.

ORDERED that Simon & Schuster and the Sterling Lord Agency submit to the Board a semi-annual and cumulative accounting in a form approved by the Board setting forth a statement of any and all monies paid or payable to Henry Hill, or his representatives or assigns, derived from the work *Wiseguy*, the first semiannual report being due within thirty (30) days after issuance of the Final Determination and Order of the Board.

Dated: May 21, 1987
New York, New York

NEW YORK STATE
CRIME VICTIMS BOARD

by:

/s/
Ronald A. Zweibel
Chairman

/s/
Gennaro Fischetti
Board Member

/s/
George L. Grober, Jr.
Board Member

/s/
Diane McGrath
Board Member

/s/
Angelo Petromelis
Board Member

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of October, one thousand nine hundred and ninety.

Present: **Hon. Jon O. Newman**
Hon. Roger J. Miner
Hon. John M. Walker, Jr.

Circuit Judges,

Filed
October 3, 1990
Elaine B. Goldsmith,
Clerk

SIMON & SCHUSTER, INC.,
Plaintiff-Appellant,

- v. -

GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE McGRATH and ANGELO PETROMELIS, individually and in their capacities as members of the New York State Crime Victims Board,
Defendants-Appellees.

89-9192

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this Court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

ISSUED AS MANDATE: October 26, 1990

[NEW YORK EXECUTIVE LAW]

§ 632-a. Distribution of moneys received as a result of the commission of crime

1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.

2. The board, at least once every six months for five years from the date it receives such moneys, shall cause to have published a legal notice in newspapers of general circulation in the county wherein the crime was committed and in counties contiguous to such county advising such victims that such escrow moneys are available to satisfy money judgments pursuant to this section. For crimes committed in a county located within a city having a population of one million or more, the notice provided for in this section shall be in newspapers having general circulation in such

city. The board may, in its discretion, provide for such additional notice as it deems necessary.

3. Upon dismissal charges or acquittal of any accused person the board shall immediately pay over to such accused person the moneys in the escrow account established on behalf of such accused person.

4. Upon a showing by any convicted person that five years have elapsed from the establishment of such escrow account and further that no actions are pending against such convicted person pursuant to this section, the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives.

5. For purposes of this section, a person found not guilty as a result of the defense of mental disease or defect pursuant to section 30.05 of the penal law shall be deemed to be a convicted person.

6. Whenever it is found, pursuant to article seven hundred thirty of the criminal procedure law, that a person accused of a crime is unfit to proceed as a result of mental disease or defect because such person lacks capacity to understand the proceedings against him or to assist in his own defense, the board shall bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules to determine disposition of the escrow account.

7. Notwithstanding any inconsistent provision of the estates, powers and trusts law or the civil practice law and rules with respect to the timely bringing of an action, the five year period provided for in subdivision one of this section shall not begin to run until an escrow account has been established.

8. Notwithstanding the foregoing provisions of this section the board shall make payments from an escrow account to

any person accused or convicted of crime upon the order of a court of competent jurisdiction after a showing by such person that such moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process. The board may in its discretion and after notice to the victims of the crime make payments from the escrow account to a representative of any person accused or convicted of a crime for the necessary expenses of the production of the moneys paid into the escrow account, provided the board finds that such payments would be in the best interests of the victims of the crime and would not be contrary to public policy. The total of all payments made from the escrow account under this subdivision shall not exceed one-fifth of the total moneys paid into the escrow account and available to satisfy civil judgments obtained by the victims of the crime.

9. Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this section shall be null and void as against the public policy of this state.

10. For purposes of this section:

(a) Victim shall mean a person who suffers personal, physical, mental, or emotional injury, or pecuniary loss as a direct result of the crime.

(b) A person convicted of a crime shall include any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted.

11. Notwithstanding any other provision of law, claims on moneys in the escrow account shall have the following priorities:

(a) Payments ordered by the board or a court pursuant to subdivision eight of the section;

(b) Subrogation claims of the state pursuant to section six hundred thirty-four of this article in an amount not exceeding one-half of the net amount of the civil judgment obtained by a victim which is payable directly to the victim from the escrow account;

(c) Civil judgments of the victims of the crime;

(d) Other judgment creditors or persons claiming moneys through the person accused or convicted of a crime who present lawful claims, including state or local government tax authorities;

(e) The person accused or convicted of the crime.

No payment shall be made out of the escrow account where such payment would be in derogation of claims, either presented or pending, entitled to a higher priority under this subdivision. The board may bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules or an action for a declaratory judgment where it cannot determine the priority of claims and the proper disposition of the escrow account.

Moneys in the escrow account shall not be subject to execution, levy, attachment or lien except in accordance with the priority of claims established in this subdivision.

12. Notwithstanding any other provisions of law, the board shall have exclusive jurisdiction and control, as escrow agent, over any moneys subject to this section. No distribution of moneys in such escrow accounts shall be made except by determination and order of the board, pursuant to the provisions of this section and the board's rules and regulations. Any party aggrieved by a final determination and order of the board under this section may seek judicial review of such decision pursuant to article seventy-eight of the civil practice law and rules.

SON OF SAM STATUTES

Ala. Code § 41-9-80 (1982)

Alaska Stat. § 12.61.020 (1984)

Ariz. Rev. Stat. Ann. § 13-4202 (Supp. 1987)

Cal. Civ. Code § 2225 (West Supp. 1988)

Colo. Rev. Stat. § 24-4.1-201 (Supp. 1987)

Conn. Gen. Stat. Ann. § 54-218 (West 1985)

Del. Code Ann. tit. 11, § 9103 (1987)

Fla. Stat. Ann. § 944.512 (West Supp. 1985)

Ga. Code Ann. § 27-3401 (1983)

Idaho Code § 19-5301 (1987)

Ill. Ann. Stat. ch. 70, para. 403 (Smith-Hurd Supp. 1988)

Ind. Code Ann. § 16-7-3.7-2 (West Supp. 1988)

Iowa Code Ann. § 910.15 (West Supp. 1988)

Kan. Stat. Ann. § 74-7319 (Supp. 1987)

Ky. Rev. Stat. Ann. § 346.165 (Baldwin 1983)

Mass. Gen. Laws Ann. ch. 258A, § 8 (West 1988)

Mich. Comp. Laws Ann. § 780.768 (West Supp. 1988)

Minn. Stat. Ann. § 611A.68 (West 1987)

Mont. Code Ann. § 53-9-104(1)(d) (1987)

Neb. Rev. Stat. § 81-1836 (1987)

Nev. Rev. Stat. § 217.265 (1986)

N.J. Stat. Ann. § 52:4B-28 (West 1986)

N.M. Stat. Ann. § 31-22-22 (1987)

N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1988)

Or. Rev. Stat. § 147.275 (Supp. 1988)

Pa. Stat. Ann. tit. 71, § 180-7.18 (Purdon Supp. 1988)

R.I. Gen. Laws § 12-25.1-3 (Supp. 1987)

S.C. Code Ann. § 15-59-40 (Law. Co-op. Supp. 1987)

S.D. Codified Laws Ann. § 23A-28A-1 (1988)

Tenn. Code Ann. § 29-13-202 (1980)

Tex. Rev. Civ. Stat. Ann. art 8309-1, § 16
(Vernon Supp. 1987)

Wash. Rev. Code Ann. § 7.68.200 (Supp. 1988)

Wis. Stat. Ann. § 949.165 (West Supp. 1988)

Wyo. Stat. § 1-40-112(d) (1988)

18 U.S.C. § 3681 (Supp. 1989)

(2)

No. 90-1059

FILED
JAN 25 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—against—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH and ANGELO PETROMELIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

O. PETER SHERWOOD
Solicitor General

HOWARD L. ZWICKEL
Chief, New York City
Litigation Bureau
and Counsel of Record

SUSAN L. WATSON
Assistant Attorney General
Of Counsel

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 341-2601

QUESTION PRESENTED

Does New York Executive Law § 632-a violate the First Amendment to the U.S. Constitution because it requires the media to turn over to the State the profits owed to a criminal who tells the story of his crime, to allow the victims of that crime to recover for their injuries?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1059

SIMON & SCHUSTER, INC.,

Petitioner,

—against—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH and ANGELO PETROMELIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This is an appeal by petitioner, the publisher of the book *Wiseguy*, from a judgment of the United States Court of Appeals for the Second Circuit (54a)[1] which affirmed a judgment of the District Court for the Southern District of New York. The Second Circuit declared New York Executive Law ("Exec. Law") § 632-a, which provides crime victims with a meaningful opportunity to be compensated for their injuries when a criminal is paid for discussing or reenacting his or her

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1 ("____ a") refers to the Appendix to the Petition.

crime in the media, to be constitutional under the First and Fourteenth Amendments to the U.S. Constitution. (1a-26a). The Second Circuit majority held that the statute directly implicates the First Amendment and that it is both necessary and narrowly tailored to achieve its purpose.

STATEMENT OF THE CASE

A. Executive Law § 632-a

New York has long recognized the common law maxim that no person "shall be permitted . . . to take advantage of his own wrong. . . ." *Riggs v. Palmer*, 115 N.Y. 506, 511-512, 22 N.E. 188, 190 (1889). In 1977, New York enacted a statute, Exec. Law § 632-a, which applies this maxim to criminals who seek to profit from selling the story of their crime. New York's statute was passed after it was reported that a serial murderer, known as Son of Sam, was being offered large sums of money for selling the rights to his story.[2]

Exec. Law § 632-a requires that any entity that contracts with a criminal[3] regarding the reenactment or discussion of the crime turn over to the New York State Crime Victims Board ("the Board") the money owing to the criminal under the contract. The Board then holds the money in an escrow account for five years and, during that time, the crime victim

2 "McGraw-Hill Book Company later bought the rights to [David] Berkowitz's [Son of Sam's] story in a deal that included a $250,000 advance, $150,000 profit to the ghost writer, and $75,000 to Berkowitz through his court-appointed conservator Doris Johnsen." Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353, 1354 (1988) (footnote omitted) ("Okuda, *Criminal Antiprofit Laws*"). The book *Son of Sam*, authored by L.D. Klausner, was published in 1981. *See In re Johnsen*, 103 Misc.2d 823, 430 N.Y.S.2d 904 (Sup. Ct. Kings Co. 1979).

3 The statute applies to persons accused or convicted of a crime committed in New York as well as to persons who admit committing a crime. Exec. Law §§ 632-a(1), (10)(b) (55a, 57a). However, once the charges against an accused person are dismissed or if there is an acquittal, that person is entitled to have all money given to the Board returned. Exec. Law § 632-a(3) (56a).

or the crime victim's estate can bring a civil lawsuit against the criminal. The lawsuit is not barred by the expiration of the regular statute of limitations for a tort action, which in New York is one or three years for personal injury actions, New York Civil Practice Law & Rules ("CPLR") §§ 214(5), 215(3) and 215(8), and two years for wrongful death actions, Estates, Powers & Trusts Law ("EPTL") § 5-4.1. Section 632-a creates a new *in rem* cause of action with its own five year statute of limitations which commences when the escrow account is established. Exec. Law § 632-a(7) (56a). *See Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (2d Dept. 1979) (upholding statute of limitations provision). The Board is required to publicize in newspapers of general circulation the availability of the money in the escrow account to satisfy judgments obtained by victims of the crime (Exec. Law § 632-a(2) [55a]), and then to satisfy any judgments out of the escrow account. Exec. Law § 632-a(1) (55a). The criminal receives all money remaining in the escrow account after five years or after all victims' judgments have been satisfied. Exec. Law § 632-a(4), (11)(e) (56a, 57a-58a).

New York's anti-profit statute is a response to the plight of victims of publicized crimes. Most crime victims will not bring a civil action against a criminal because the criminal usually has no assets.[4] A criminal may profit considerably from a book or movie about the crime and these profits may be acquired after the regular statute of limitations has run.[5]

4 "Ninety percent of convicted criminals have annual incomes of less than $5000 at the time of arrest. Over half of all convicted felons are unemployed at the time of arrest." R. Reiff, *The Invisible Victim: The Criminal Justice System's Forgotten Responsibility*, 137 (1979). "Of those [criminals] who are apprehended, few are of legal age to be subject to [a civil] action or have the resources to pay for the costs of the damages they have inflicted." R. Meiners, *Victim Compensation*, 3 (1978).

5 *See* Comment, *In Cold Type: Statutory Approaches To The Problem Of The Offender As Author* ["Comment, *In Cold Type*"], 71 J. Crim. L. & Criminology 255, 267 (1980) (discussing criminals' cooperation in 1977 book and 1978 film concerning $1.5 million robbery of the Boston office of Brink's Inc. that took place in 1950).

In addition, unless the victim can succeed in attaching the criminal's profits from a book or movie before obtaining a civil judgment, the assets may be dissipated.[6] Therefore, without the New York anti-profit law, a criminal could be paid a large sum of money for selling the story of his crime while his or her victims would be left without any meaningful remedy. As the New York courts have recognized:

> Clearly, it is not for lack of merit that the victim of a crime does not at once sue for the tortious injury. In fact the criminal conviction would be conclusive proof of most of the elements necessary to recover on an analogous claim in tort. The obvious reason that a victim ordinarily withholds suit is that he believes that the defendant is indigent, so that the expenditure of the time and money involved in a civil litigation would be of no avail. . . . It would be ironic to hold that a victim who may have been killed, maimed or otherwise injured is to be left remediless while the felon could reap the 'fall-out' rewards of the victim's injuries.

Barrett v. Wojtowicz, 66 A.D.2d at 614-15, 414 N.Y.S.2d at 356-357.

While the statute protects profits for the sake of victims, it does not prohibit a criminal from speaking about his crime nor does it prohibit a publisher from publishing the criminal's reenactment or discussion of the crime. The statute is directed only at the money to be paid the criminal and not at his expression.[7]

---

6 Avoiding dissipation of the criminal's profit is an important component of anti-profit laws. Virtually all of the other states' laws contain a provision, similar to Exec. Law § 632-a(9), which prohibits any action taken by a criminal "by way of execution of a power of attorney, creation of corporate entities or otherwise" that defeats the purpose of the statute. *See generally*, Note, *Alabama's Anti-Profit Statute: A Recent Trend in Victim Compensation*, 33 Ala. L. Rev. 109, 114 and n.23 (1981).

7 "The antiprofit law simply implements a special procedure for preserving a victim's cause of action against a criminal until the criminal has an asset from which to collect a judgment. Since the criminal's story rights are one of her more valuable assets, targeting that asset for the victim's recovery is an effective means of ensuring that the victim will be compensated." Okuda, *Criminal Antiprofit Laws* at 1367.

Although the statute may create a disincentive for some criminals to speak because they are not guaranteed immediate payment of all of their profits, New York's anti-profit statute contains a number of provisions which would encourage criminals to tell their story. First, the statute allows the criminal to receive a portion of the escrowed money to pay legal fees in his criminal proceedings, thereby permitting him, if he has no other assets, to obtain private counsel. Exec. Law § 632-a(8) (56a-57a).[8] Second, a representative of the criminal, such as a literary agent, may seek his fee in assisting the criminal to produce the work. *Id.* The escrow account may be used for these two purposes for up to twenty percent of the money in the account. *Id.* Third, the criminal is entitled to all money remaining in the escrow account after victims' judgments, and any judgments from other creditors (who are not entitled to the extended statute of limitations provision), are satisfied. Exec. Law §§ 632-a(4), (11)(e) (56a, 57a-58a). Fourth, the criminal who wishes to financially repay his victims for their injuries and suffering can assist in that endeavor because, under the statute, the victim's judgment takes priority over the outstanding judgments of other creditors, including state and local government tax authorities. Exec. Law § 632-a(11)(c), (d) (57a-58a).[9] Finally, the person

8 "A criminal may also enter a media contract to raise money for her most pressing need, her criminal defense." Okuda, *Criminal Antiprofit Laws* at 1365. "Experience shows that offenders will contract for their stories in order to pay legal fees. In all of the reported cases of offenders selling or assigning the rights to the story of their crimes, the proceeds were applied in whole or in part to the payment of legal fees." Comment, *In Cold Type* at 260 (footnote omitted).

9 For example, "Gary Gilmore requested several times before he was executed that a portion of the proceeds from any stories about his life and crime be distributed to the families of his victims." Okuda, *Criminal Antiprofit Laws* at 1364 n.74 (citation omitted). See also "2 Murder Victims Had Much In Common," N.Y. Times, Jan. 18, 1977, at 21, col. 4.

accused of a crime is entitled to have all money returned if he is acquitted or the charges are dismissed. Exec. Law § 632-a(3) (56a). As one commentator has noted:

> In fact, criminals, like other speakers, have motivations for speaking besides pecuniary gain, and there is some evidence that criminals are willing to share their stories for no compensation at all. Sometimes, for example, criminals actually desire to compensate their victims. In such cases, antiprofit laws would encourage speech rather than deter it. Criminals may also be motivated to speak by a desire to publicize their side of the story, retrying the case they had lost [in the court of law] in the court of public opinion.

Okuda, *Criminal Antiprofit Laws* at 1364-1365 (footnotes omitted); *see also* Comment, *In Cold Type* at 260 (discussing incentives to speak in New York's statute).

B. Legislative History Of Executive Law § 632-a

The statute was enacted to ensure that the victim's right to compensation is protected whenever the criminal attempts to profit from discussing or reenacting the crime. As the author of the bill stated:

> It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured—while five people are dead, other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the *victim must be more important than the criminal.*

Memorandum of Senator Emanuel R. Gold, *reprinted in* 1977 New York State Legislative Annual 267 (emphasis supplied).[10]

10 *See* "Criminals' Revenues from Stories Curbed", N.Y. Times, Aug. 13, 1977, at 20, col. 3 (sponsor of the New York bill stated that "he developed the bill after reading a newspaper account during the hunt

The legislative history makes clear that the overriding purpose of the bill is to protect the rights of victims of publicized crimes to receive compensation *before* the criminal is paid for telling the story of his crime.

> Currently a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. *This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.* The requirement of a civil action will prevent the abuse of this privilege.

See Assembly Bill Memorandum Re: A 9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, N.Y. Laws of 1977, ch. 823 (emphasis supplied). (14a)

The bill received widespread support throughout New York's criminal justice community. For example, the Director of the Division of Criminal Justice Services wrote to the Governor's counsel:

> Though hardly a new phenomenon, there has been a recent realization by the general public that where a defendant is a well-known personality or the crime with which he is charged is one that has aroused a high degree of public interest, he is in a position to make a considerable amount of money from articles, books or television accounts of his life, times and crimes. . . .
>
> . . . *this bill* takes cognizance of the situation and *seeks to redirect the money flow from the criminal to his victims.* As an expression of the concept of simple justice it

for the 'Son of Sam' stating that the killer 'stood to get rich' and that there would be people 'waiting at the precinct house, to get him to sign a contract' "; *see also* Winfrey, " *'Son of Sam' Case Poses Thorny Issues for Press*", N.Y. Times, Aug. 22, 1977, at 1, col. 1 (discussing ethical problems posed for press by coverage of killings and alleged $50,000 to $100,000 requested for taped interview with Berkowitz).

> cannot be faulted. It is merely another facet of the oft-repeated maxim that crime does not (or should not) pay.

See Memorandum from Robert Schlanger, Division of Criminal Justice Services, to Judah Gribetz, dated August 3, 1977, *reprinted in* Legislative Bill Jacket, N.Y. Laws of 1977, ch. 823 (emphasis supplied). (14a-15a)

The statute has been amended three times to strengthen its scope and coverage "to extend and protect the victim's rights" (Memorandum of Senator Emanuel R. Gold, *reprinted in* 1978 New York State Legislative Annual 243), and "to ensure that the original legislative intent of preserving . . . moneys for recovery by the victims of the crime can be effectively implemented." Memorandum of Senator Ralph J. Marino, *reprinted in* 1981 New York State Legislative Annual 247.

In the past 14 years, almost 40 states and the federal government have enacted statutes modeled after New York's law.[11] However, a number of the states' anti-profit laws go beyond the specific and narrow objective of New York's statute, and have as one of their objectives the forfeiture of the criminal's profits.[12]

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11 *See* 59a-60a. "Particularly notorious crimes seem to have prompted anti-profit legislation in other states as well." Okuda, *Criminal Anti-profit Laws* at 1355 (footnote omitted).

12 At least 15 states provide that the remainder of the escrow money shall be paid to the State and not to the criminal. *See, e.g.*, Ala. Code § 41-9-82 (1982); Alaska Stat. 12.61.020(a) (1989); Ariz Rev. Stat. Ann. § 13-4202E (1989); Ark. Code Ann. § 16-90-308(c)(2) (1987); Conn. Gen. Stat. Ann. § 54-218(b) (West 1985); Ind. Code Ann. § 16-7-3.7-5 (Burns 1983); Kan. Stat. Ann. § 74-7320(5) (Supp. 1989); La. Rev. Stat. Ann. § 46:1835(B) (West 1982); Miss. Code Ann. § 99-38-9(3) (Supp. 1990); Mo. Ann. Stat. § 595.045(11) (Vernon 1991); Mont. Code Ann. § 53-9-104(1)(d) (1989); N.J. Stat. Ann. § 52:4B-30(a)(5) (West 1986); Okla. Stat. Ann. tit. 22, § 17(C) (1991); Or. Rev. Stat. § 147.275 (1989); Wyo. Stat. § 1-40-112(b) (1988). *See also* 18 U.S.C.A. § 3681(c)(2) (West 1985 & Supp.).

C. Executive Law § 632-a And Wiseguy

In September, 1981, Simon & Schuster entered into a publishing agreement to pay money to Henry Hill, a person who had admitted to federal authorities committing various crimes (and had been placed in the Federal Witness Protection Program in exchange for his agreement to cooperate) and to Nicholas Pileggi, a writer and reporter, for a work to be written by Pileggi about Hill's life, entitled *Wiseguy*. In turn, Hill and Pileggi sold exclusive publishing rights to Simon & Schuster for *Wiseguy*. (47a-48a)

Wiseguy: *Life In A Mafia Family*, was published in 1985. The story dates from 1955 when, at the age of eleven, Hill became involved in organized crime. In *Wiseguy*, Hill describes in great detail "countless . . . infamous crimes" (CA. App. 10)[13] he committed as well as those he helped others to commit. (48a)

In January, 1986, the Board learned for the first time of the contract between Simon & Schuster and Hill for the publication of *Wiseguy*. (48a) After reviewing the contract and *Wiseguy*, the Board issued a Proposed Determination and Order on May 27, 1987, finding that the contract and book are covered by Exec. Law § 632-a because *Wiseguy* contains Hill's admission to involvement in various crimes as well as Hill's discussion of those crimes. (50a) The Board determined that all money paid to Hill under the contract must be turned over to the Board to be held in escrow for the victims of crimes committed by Hill. (50a) One victim of Hill's crimes has already come forward to advise the Board that she intends to bring a civil suit against Hill based upon the murder of her husband, William Bentvana, a/k/a Billy Batts. (CA. App. 258)

Hill was also ordered to turn over to the Board the money already paid to him under the contract ($96,250 less any agent fees) and Simon & Schuster was ordered, in the event Hill failed to return the money, to turn over the money it

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13 ("CA. App.") refers to the joint appendix in the United States Court of Appeals for the Second Circuit.

wrongfully distributed to Hill. (51a-52a) Nicholas Pileggi was determined to be a co-author and not a representative of Hill, and, therefore, he was entitled to retain all of the proceeds due him under the contract. (50a)

All parties had thirty days to request a hearing and to submit objections to the Proposed Determination and Order. (46a) Simon & Schuster and Hill did not object. The only party to object was Hill's literary agent, who sought, pursuant to Exec. Law § 632-(a)(8) (56a-57a), to retain his ten percent literary fee as provided for in the contract. On October 19, 1988, the Board issued its Final Determination and Order and granted the literary agent's application. The Board's determination with respect to Simon & Schuster and Hill became final at that time.

D. District Court Proceedings

Petitioner commenced this action on August 3, 1987 seeking declaratory and injunctive relief with respect to the statute (CA. App. 3-5).[14] In the District Court, petitioner submitted affidavits in support of its summary judgment motion, all purporting to demonstrate that Exec. Law § 632-a restricts the common industry practice of directly compensat-

14 The present case is the only federal court challenge to the validity of an anti-profit statute under the First Amendment. The other cases to directly address the First Amendment issue have been brought in state court and in all of these cases, the statutes at issue were upheld. The cases in New York include *Children of Bedford, Inc. v. Petromelis* ["Children of Bedford"], 143 Misc.2d 999, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989), *aff'd on opn. below*, _____ A.D.2d _____, 556 N.Y.S.2d 483 (1st Dept. 1990), *appl. pendg.* (Ct. of Appeals) (Jean Harris's book *Stranger In Two Worlds*); *St. Martin's Press v. Zwiebel*, No. 89/12273 (Sup. Ct. N.Y. Co. Feb. 11, 1990), N.Y.L.J. Feb. 26, 1990, p. 25, col. 1 (R. Foster Winan's book *Trading Secrets*). The only case outside New York in which the validity of an anti-profit law under the First Amendment was addressed was in New Jersey where the statute was upheld by the lower court, but an appellate court reversed the lower court's decision on statutory grounds and did not decide the constitutional issue. *Fasching v. Kallinger*, No. L-069197-83 (N.J. Super. Ct. Law Div. July 24, 1985), *rev'd on other grounds*, 211 N.J. Super. 26, 44, 510 A.2d 694, 696, 702-704 (Super. Ct. App. Div. 1986).

ing criminals who serve as primary sources or authors and thereby discourages publication. (CA. App. 73-191.) The affiants, however, did not point to any particular criminals or projects that they had in fact declined to pursue due to § 632-a. (CA. App. 86-87, 125-126.) Hill did not submit an affidavit and no other criminal stated that the statute had caused him or her not to speak about his or her crime or to write or cooperate in a book about it.[15]

In their cross-motion for summary judgment, respondents pointed out that the statute had not inhibited the publication of *Wiseguy*. The Board also stated that in 1988, it was considering at various administrative stages, ten cases in which publishing, film or television contracts had been entered into with criminals for the story of their crimes, including contracts with R. Foster Winans (*Trading Secrets*), Mark David Chapman (People Magazine article "The Man Who Shot John Lennon"); and Michelle Sindona (*Power on Earth* [by Nick Tosches]). (CA. App. 347-348) At that time, the Board also was investigating some ten other cases in which a criminal or his representative may have received money for his crime story. (CA. App. 348)[16]

In its decision dated October 24, 1989, the District Court found that Exec. Law § 632-a had an incidental effect on speech activities. The court reasoned: "Although it applies only to contracts with respect to the expression of the crimi-

15 Nicholas Pileggi, the author of *Wiseguy*, noted that he had not pursued three projects because the statute would not allow his sources to be paid immediately. (CA. App. 95) The record does not disclose whether those sources declined to cooperate with Pileggi because of the statute. Pileggi also stated that in his view, Hill would not have cooperated with him on *Wiseguy* if he was not going to be paid at all. (CA. App. 93)

16 *See also* Okuda, *Criminal Antiprofit Laws* at 1364 and n.71 (discussing books written and published in New York since Section 632-a was enacted); Note, *Publication Rights Agreements In Sensational Criminal Cases: A Response To The Problem*, 68 Cornell L. Rev. 686 n.2, 687 n.4 (1983) (discussing books, articles and movies in which publishers paid large sums of money to criminals to acquire publication rights to their criminal story).

nal's feelings about or recollection of his or her crime, the statute's reach is not prohibitive of the expressive activity. The effect is limited to the nonexpressive element of the activity: receiving a profit." (38a) The District Court then upheld the statute under the test for incidental limitations on First Amendment freedoms set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). Applying that test, the District Court determined that New York's interest in victim compensation is an important one, that the interest is unrelated to freedom of expression and that any restriction on speech is no greater than is essential to promote the government's interest because the statute "is drawn . . . to garnish the proceeds so that they will be used in a productive manner [and t]he statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from directly profiting from his or her crime."[17] (41a-42a)

E. Court of Appeals Decision

The Second Circuit (one judge dissenting) affirmed the District Court's judgment but on different grounds. The Court of Appeals reasoned that "the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes" because "[w]ithout a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write." (11a) The majority also found that the statute singles out the media for differential treatment based on expressive content. (12a-13a) Accordingly, the court decided that to withstand this First Amendment challenge, Section 632-a must survive strict scrutiny, i.e., " 'the State . . . must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)." (12a-13a)

17 The District Court also rejected petitioner's contention that the statute violates the due process clause because it is overbroad and vague. (42a-44a) Petitioner abandoned this claim in its appeal to the Second Circuit. (10a)

The court then determined that the State had met its burden of showing that Exec. Law § 632-a is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest. The majority found that New York has a compelling interest "in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization. . . . Our society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime." (13a-14a) The court reasoned that the statute is necessary to serve that interest because it "assure[s] that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited." (15a)

Finally, the court determined that the statute recognizes that the only way a criminal can profit from a specific crime involving a specific victim, apart from obtaining any proceeds of the crime itself, is to tell (and sell) the story of the crime and that the sole asset of most criminals is the right to tell the story of their crimes. (15a) Therefore, the statute narrowly serves the state's compelling interest because the specialized attachment mechanism in Exec. Law § 632-a "is designed to freeze the proceeds of storytelling by criminals for the benefit of those whose misfortunes gave rise to the story." (16a)

The dissenting judge agreed that the statute should be held to a standard of strict scrutiny review. However, he concluded that the state's interest in victim compensation was not served by the statute in a manner narrowly tailored to achieve that end because, in his view, the statute was both under and over-inclusive. (21a-25a)

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Decision Does Not Conflict With Any Decision Of This Court

Petitioner first claims that this Court should grant review because there allegedly is a conflict between the Second Circuit's decision and other First Amendment decisions of this Court. (Petition, pp. 10-16). The lower court's application of strict scrutiny to this unique statute is based on settled principles of law and does not conflict with any decision of this Court.[18] The majority's application of the strict scrutiny test is, however, a narrow one. That holding is limited to the specific state interest furthered by § 632-a and the ends the statute seeks to achieve.

In applying the strict scrutiny test, the Second Circuit first determined that New York has a compelling interest in preventing the unjust enrichment of criminals at the expense of their victims. The legislative history of the statute and New York's public policy support that determination. Society's sense of fairness is offended when a criminal seeks to profit by capitalizing on his criminal activity in the media while his victims remain uncompensated for their injuries. Moreover, reenactment or other depiction of the crime in the media often causes additional suffering to victims and their families. The Legislature must be permitted to take account of that inequity and suffering in fashioning a victim compensation remedy that ensures victims a meaningful opportunity to be compensated. As one commentator has aptly stated:

> The . . . antiprofit legislation thus presents a sound solution to the unequal rewards given the criminal by our mass-media society. Victimized once at the hands of the wrongdoer, the victim should not be victimized again by the financial rewards paid to the criminal for the

18 Similarly, all of the New York courts which have addressed the validity of Section 632-a under the First Amendment have upheld the statute. See n.14 *infra*. The N.Y. Court of Appeals is scheduled to hear argument in the *Children of Bedford* case on March 26, 1991.

> story of his crime. As the price for crime stories has risen, those who have paid the most—the victims—are finally compensated for their unwanted role in the criminal's story.

Okuda, *Criminal Antiprofit Laws* at 1375.

Petitioner can point to no decision of this Court which suggests that New York's interest in ensuring that criminals do not profit from their crimes at the expense of their victims is not compelling. *Cf. Caplin & Drysdale Chartered v. United States*, 109 S. Ct. 2646, 2654 (1989) (governmental interest in depriving criminals of economic powers derived from their criminal activity); *Landau v. Vallen*, 895 F.2d 888, 891 (2d Cir. 1990) ("All things being equal, we believe courts in the civil context should be particularly sensitive to the rights of the victims of crimes when they seek compensation from those accused of inflicting their injuries.") However, petitioner argues that the Second Circuit committed error because it identified the compelling state interest so narrowly that the statute would necessarily serve that interest. (Petition, p. 13). To the contrary, New York's interest is not to compensate the broad class of crime victims: rather, Section 632-a was enacted to benefit a special category of victims, i.e., the victims of those criminals who seek to profit by telling the story of their crime.[19]

The Court of Appeals' further conclusion that the statute is necessary to serve the state's compelling interest and is narrowly tailored to achieve that interest (15a-16a) also has no

19 *See also* Comment, *In Cold Type* at 268 ("The objectives of section 632-a differ from the general crime victims compensation scheme. Instead of compensating all victims for their injuries, the statute is limited to those cases in which the offender would be unjustifiably enriched as a result of the crime in which the victim was injured. . . . The victim is allowed to raise his claims to the escrow account, not out of legislative grace as in the case of the compensation monies, but through an equitable right to them as the victim of the crime which generated them. In this way, the statute is concerned with the special nature of the funds being attached rather than the needs of victims in general." (footnote omitted)

application beyond the record in this case because it was based upon factors particular to New York's statutory scheme.

First, the statute is necessary to serve the state's compelling interest because it provides the most effective means of ensuring that crime victims are compensated when the criminal is paid for telling the story of the crime. The statute creates a separate cause of action and a five year statute of limitations which does not begin to run until an escrow account is established. These provisions ensure that a victim whose right to commence a tort action has expired under New York's general statute of limitations will be able to bring a civil action against the criminal under § 632-a (although satisfaction of his or her judgment is limited to the money in the escrow account). The statute also ensures that the money is paid into the escrow account and is not dissipated while the victim pursues his or her remedy. Victims are more likely to bring civil actions against criminals and, if they obtain a judgment, receive compensation, if they are assured that the criminal has assets which will not be dissipated in the time it takes to obtain and then satisfy a money judgment. The current provisions of the New York CPLR, Article 62, regarding judgment creditors, do not provide the same protections for victims as does the attachment feature of Exec. Law § 632-a, i.e., the requirement that the Board hold all money until all victims' judgments have been satisfied. As the Court of Appeals stated, New York's general provision for attachment under Article 62 of the CPLR is "too limited to fulfill the State's interest in seeing that victims are the first to be compensated from the proceeds of crime story exploitation. . . . Recovery by many crime victims would be rendered impossible if attachment were limited to [article 62]." (16a)

Second, the statute is narrowly tailored to achieve New York's compelling interest because it targets only the criminal's profit. Criminals remain free to discuss the crime or anything else they wish. The statute does not forbid them from speaking. In addition, the statute targets only the criminal's decision to profit by capitalizing on the publicity of his

or her crime. If the criminal chooses to speak publicly about his or her crime and gets paid for doing so, the victims of that crime are assured a meaningful opportunity to obtain compensation. As the Second Circuit recognized, "the sole asset of most criminals is the right to tell the story of their crimes" and "the only way a criminal can profit directly from a specific crime involving a particular victim . . . is by writing or talking about it or reenacting it." (15a) *See also Children of Bedford*, 143 Misc.2d at 1007, 541 N.Y.S.2d at 900 ("as a practical matter, most criminals will possess no other source of income.")

The Second Circuit's application of the strict scrutiny standard is clearly distinguishable from other decisions of this Court, cited by petitioner, where a compelling state interest was found *not* to be necessary or narrowly tailored to achieve the State's objectives. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (State has a compelling interest in raising revenue, but that interest does not justify special use tax on the press); *Carey v. Brown*, 447 U.S. 455 (1980) (State has an important interest in preserving residential privacy, but that interest does not justify exemption for peaceful picketing of a place of employment involved in a labor dispute). In these cases, the distinctions drawn by the statute were not based upon a compelling state interest nor were such distinctions necessary to serve the interest posited by the state. In short, there was not a sufficient fit between the state's compelling interest and the means employed to satisfy it. *See Board of Trustees of the State University of New York v. Fox*, ____ U.S. ____, 109 S. Ct. 3028, 3033, 3035 (1989). As demonstrated above, the lower court properly applied strict scrutiny here based upon a substantial record supporting New York's compelling interest in ensuring that criminals not profit at the expense of their victims and the statute is narrowly drawn to achieve that specific objective.

Because the statute can be sustained under the factors set forth in *United States v. O'Brien*, it is also unnecessary for this Court to review the decision below to address the Court

of Appeals' application of strict scrutiny. The New York State courts have upheld Section 632-a as an incidental infringement on First Amendment rights which "is no greater than is essential to the furtherance of [a substantial State interest]. *United States v. O'Brien*, 391 U.S. 367, 377 (1968)." *Children of Bedford*, 143 Misc.2d at 1006-7, 541 N.Y.S.2d at 900.

The *O'Brien* standard applies here because Section 632-a is directed only at the criminal's profits in order to aid victim compensation, and not at any expressive conduct. The statute does not impose an affirmative barrier which prevents the criminal from speaking or from disseminating his message but may affect only his willingness to speak because he is not guaranteed full and immediate payment. It is well-established that "[f]reedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). If the only deterrence to speech is the loss of remuneration, the speaker cannot be considered a "willing speaker," that is, one who wishes to but is being prevented from expressing his thoughts and feelings. *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-706 (1986) and *Branzburg v. Hayes*, 408 U.S. 665, 680 (1972) (First Amendment is not violated by a generally applicable statute directed toward nonexpressive conduct which may have the effect of restricting speech); *cf. Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. at 2654 (provision of the federal drug forfeiture statute does not violate the Fifth and Sixth Amendments. "If defendants have a right to spend forfeitable assets on attorney's fees, why not on the exercise of the right to speak, . . ?")

B. The Record Does Not Support Petitioner's Assertion That Unless The Decision Below Is Reviewed There Will Be A Significant Deterrent Effect On Publication Of Stories By Criminals

Petitioner's second reason for seeking review by this Court is based on its view that the New York statute "will deter protected speech in ways that will escape review." (Petition,

p. 16). Petitioner states that, as a result of Section 632-a, criminals will be deterred from seeking publishing contracts, publishers will be deterred from seeking out and pursuing some projects and writers and publishers will be pressured to delete any content that triggers the law's application. *Id.*

It is significant that petitioner's entire argument is premised on affidavits by several important people in the publishing industry as to how they have altered, or plan to alter, their behavior as a result of the statute, and speculation as to what books might never have been published had Section 632-a been in effect at the time of publication. The record is barren of any concrete examples from publishers or criminals that the statute has deterred them from speaking or from publishing, and the affiants' statements must, therefore, be considered conjectural. *See also* discussion above at p. 11 and n.15.

This Court has previously declined to find a First Amendment violation where the evidence suggesting that speech will be deterred was based primarily on speculation. In *Branzburg v. Hayes*, 408 U.S. at 693-94, this Court noted that the evidence presented concerning the deterrent effect of issuing subpoenas to reporters to appear before grand juries on the willingness of confidential sources to speak to reporters was "widely divergent and to a great extent speculative. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of professional self-interest of the interviewees." *Id.* (footnotes omitted)

The same type of "widely divergent" views are presented here because the record demonstrates that books by criminals continue to be written and obviously some criminals will continue to speak regardless of the monetary disincentive contained in the statute. Moreover, the fact that there are monetary incentives to speak in the statute and that criminals have continued to write books about their crimes makes it unclear what the actual effect of the statute will be.

Even if petitioner could prove that some criminals may refuse to speak unless they are guaranteed immediate payment, proof of such deterrence does not, by itself, create an issue worthy of this Court's review. "[E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for civil damages has less money to spend [on protected activities], yet no one would suggest that such liability gives rise to a First Amendment claim." *Arcara v. Cloud Books, Inc.*, 478 U.S. at 706.

Finally. petitioner argues that the statute will cause publishers to delete passages from works in order to avoid the statute's reach. (Petition, p. 18) However, Section 632-a does not require publishers to delete material about the crime in order to publish the book. Moreover, "[T]hat instances may be envisioned where a work should not be made subject to the provisions of the statute, such as where the crime is a minor offense or was committed by a youthful offender or in the remote past, does not render it constitutionally vague. . . . Petitioners may be assured 'that the New York courts will apply the statute consistently with the constitutional command'. . . ." *Children of Bedford*, 143 Misc.2d at 1008, 541 N.Y.S.2d at 900-901.[20]

In sum, petitioner's assertions that the statute will have the effect of deterring works from being published and that protected conduct will escape court review are both speculative.

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20 Subsequently, in *Application of Jean Harris v. Abate*, Index No. 89/24246 (Sup. Ct. N.Y. Co. March 23, 1990), N.Y.L.J. April 2, 1990, p. 25, col. 3, another New York court held that a magazine article by Jean Harris, titled "My Life In Prison" which contained a few sentences about the crime Ms. Harris was convicted of committing, was not subject to Section 632-a because the core of the article is about prison life and the sentences which refer to the crime are "merely incidental and *de minimis*. . . ." A New York court has also held, in quashing a subpoena issued by the Board, that the statute does not apply where a person pled guilty to a "victimless" crime. *Halmi v. New York State Crime Victims Board*, 12 Media L. Rep. (BNA) 2388 (Sup. Ct. N.Y. Co.), N.Y.L.J. June 5, 1986, p. 12, col. 3, *aff'd on opn. below*, 128 A.D.2d 411, 512 N.Y.S.2d 650 (1st Dept. 1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated New York, New York
January 25, 1991

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IN THE

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OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

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—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

I

THE DECISION BELOW MISCONCEIVES AND MISAPPLIES STRICT SCRUTINY IN CONFLICT WITH DECISIONS OF THIS COURT

The conflict between the decision below and this Court's First Amendment jurisprudence is underscored by the Board's concession that the purpose of Section 632-a is "not to compensate the broad class of crime victims" but only "to benefit a special category of victims, *i.e.*, the victims of those criminals who seek to profit by telling the story of their crime." (*See* Brief in Opposition at 15.) That Section 632-a makes the exercise of First Amendment rights the trigger of special victims' compensation is precisely what renders the law unconstitutional.

The Petition urged that review was necessary because the decision below effectively jettisoned the longstanding rule that to uphold a statute that differentially regulates the press, or one whose application depends on content, the state must demonstrate that not only the regulation but also the suspect distinctions it draws are necessary to serve compelling governmental interests. *See* Petition at 12-14 (relying on *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), and *Carey v. Brown*, 447 U.S. 455 (1980)).

The Brief in Opposition fails utterly to explain how this requirement can be met or why the failure to comply with it is not fatal to Section 632-a. The Board does not dispute its obligation to justify the law's distinctions, *see* Brief in Opposition at 14-17, but it fails to identify any compelling interest for assisting only "a special category of victims, *i.e.*, the victims of those criminals who seek to profit by telling the story of their crime."

Consider, for example, three robbers who jointly hold up a bank. One of the three, like Willie Sutton, is hired after serving a prison sentence to assist a bank in avoiding further robberies, based on his experience; the second is granted immunity and enrolled in the witness protection program and given monthly "transitional" payments; the third, after a prison sentence, becomes a black political activist and writes his life story as *The Autobiography of Malcolm X*. New York does not prohibit these payments to the first two criminals, even though their their conduct is made possible by a "specific crime involving a particular victim" (*see* Brief in Opposition at 17, quoting the decision below, 15a); only the payment to the author is banned.[1]

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[1] The Board's conclusory assertion that strict scrutiny was applied "*based upon a substantial record* supporting New York's compelling interest in ensuring that criminals not profit at the expense of their victims . . . " (Brief in Opposition at 17) is simply inaccurate. The three affidavits submitted by the Board made no attempt to provide evidentiary support for any of the factual propositions that the Board was required to prove to pass strict scrutiny — for example, that any necessary improvements to existing laws could not have been enacted without content-based distinctions and targeting of the media, that there was a compelling need to limit the statute only to payments for

(continued...)

Without compelling necessity for a measure assisting victims only of crimes which are subsequently mentioned in works by convicted, accused, or self-admitted criminals, and not crime victims generally, Section 632-a and the decision below cannot be squared with this Court's cases. (Petition at 12-16.)

Apparently aware of its failure to prove that distinctions in regulation targeting the press and content-based regulation be found necessary to serve compelling interests, the Board seeks to avoid review on a ground that each member of the Second Circuit panel rejected, namely that the statute could have been sustained under the lesser standard of *United States v. O'Brien*, 391 U.S. 367 (1968). Brief in Opposition at 17-18. *O'Brien* considered a statute of general applicability that could, in some instances, affect expressive conduct. Section 632-a, by contrast, is designed to deal with speech in every instance of its application, and, further, is content-based. Thus, correctly, neither the majority nor the dissent below invoked *O'Brien*.

All panel members agreed that *Meyer v. Grant*, 486 U.S. 414, 423-25 (1988), unambiguously and unanimously held that direct restrictions on payments for speech are tantamount to direct restrictions on speech subject to scrutiny. *See* Petition at 11.[2] The failure of the Brief in Opposition to distinguish or even cite *Meyer* only highlights the conflict between that decision and the judgment below.

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[1](...continued)
speech, and that doing so would likely serve the state's interest more than it would hurt it.

To the extent that the Brief in Opposition offers any factual support for Section 632-a, it relies solely on conclusory statements in law review articles written well after enactment of the statute.

[2] *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702, 707 (1986) (different standard of review for generally applicable laws that are incidentally applied to bookstores than for laws having "the inevitable effect of singling out those engaged in expressive activity"); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) ("We cannot share the view that . . . expenditure limitations are comparable to restrictions on conduct upheld in *O'Brien*.")

Finally, the need to review the decision below is not altered by the Board's attempt to justify the law's limitation only to victims of those who later write about their crimes with the maxim that no person "shall be permitted . . . to take advantage of his own wrong." The Board has not yet shown how payment for books like *The Autobiography of Malcolm X* or *Manchild in the Promised Land* can constitutionally be considered "taking advantage of" crime, rather than compensation for the time and effort expended in creating protected speech. The Board has not shown why the state should regulate payment for writing about crime but not payment for other activities in which criminals "take advantage . . . of [their] own wrong[s]." In any event, none of the judges below thought that preventing crime from paying was in fact the interest underlying the statute. The law, moreover, plainly permits such "taking advantage" of crime, since it provides that covered payments for expression will be returned to the criminal-author after five years if no judgment has been obtained, or if the author's own funds have satisfied the judgment.

II

THE RECORD AND COMMONSENSE SHOW THAT THE SON OF SAM LAW POSES A CONTINUING THREAT TO SPEECH

Attempting to avoid review by asserting that "the record is barren of any concrete examples from publishers or criminals that the statute has deterred them from speaking or from publishing . . . ", the Board has ignored this Court's First Amendment jurisprudence and misstated the record. Brief in Opposition at 19.

The Court regularly takes judicial notice of the likely consequences of laws restricting payments for speech, just as it considers the likely consequences of any legislation affecting fundamental rights. *See, e.g., Meyer v. Grant*, 486 U.S. at 423-24; *Riley v. National Federation of the Blind*, 487 U.S. 781, 789, 794 (1988); and *Buckley v. Valeo*, 424 U.S. at 19 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.") By contrast, the

cases that the Board claims hold that any deterrent effect must be proven without reliance on what is likely to occur, *Branzburg v. Hayes*, 408 U.S. 665, 693-94 (1972), and *Arcara v. Cloud Books, Inc.*, 478 U.S. at 706, are inapposite, since those cases considered not speech-targeted and content-based measures, as here, but only generally applicable measures incidentally applied to expressive conduct (in *Branzburg*) or incidentally applied to non-expressive conduct (in *Arcara*). Such laws are judged under entirely different standards than laws that are content-based or that target speech. *Arcara*, 478 U.S. at 704, 706-07.

In addition to what logic and basic economics teach is the "inevitable effect of reducing the total quantum of speech," *Meyer v. Grant*, 486 U.S. at 423, Simon & Schuster also relied on uncontradicted affidavits showing "concrete examples" of the law's deterrent effect. *See* Petition at 7-8, 11-12, 17 (citing affidavits below providing examples of bowdlerized text and books not undertaken resulting from Son of Sam laws). The Board's ignoring these cannot erase them from the record.

CONCLUSION

The petition for a writ of certiorari should be granted.

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BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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AMICUS BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. INTEREST OF THE AMICUS CURIAE

Amicus curiae Motion Picture Association of America, Inc. ("MPAA") is a New York not-for-profit corporation that seeks to advance the interests of the American motion picture industry. MPAA's members[1/] are primarily engaged in the production and distribution of filmed entertainment, including theatrical motion pictures and television programs.

Four decades ago, the Court recognized the important expressive role films play in modern society:

1/ Buena Vista Pictures Distribution, Inc., Columbia Pictures Entertainment, Inc., MGM/Pathe Communications Company, Orion Pictures Corporation, Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios, Inc., Warner Bros. Inc.

"It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform . . .

> 'The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine.'"

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (quoting Winters v. New York, 333 U.S. 507, 510 (1948)).

New York's "Son-of-Sam" law, N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1990), places substantially the same burdens upon film-makers as it does upon

book publishers: persons accused or convicted of crimes, or who admit crimes, § 632-a.10(b), will have no incentive to grant motion picture companies the right to make motion pictures that are based upon or depict their crime, and therefore many works of social and political importance either will not be made or will be significantly truncated. Film-makers, like book publishers such as the petitioner herein, Simon & Schuster, thereby are constrained in what they may depict. Such a constraint directly burdens film-makers' First Amendment rights and discourages them from making certain types of films, "all of which will ultimately 'reduc[e] the quantity of expression'." See Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 794 (1988)

(quoting Buckley v. Valeo, 424 U.S. 1, 19, 39 (1976)). The "Son-of-Sam" law's chilling effect on film-making thus represents a matter of grave concern to the MPAA.

Moreover, MPAA's concern extends well beyond the borders of New York. The "Son-of-Sam" law has spawned similar legislation in a great many other states.[2/] A federal statute also has

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[2/] See, e.g., Joint Appendix in the United States Court of Appeals for the Second Circuit ("CA App.") 200, 206-07, Affidavit of Angelo Petromelis at ¶ 14 (Mar. 10, 1988), providing examples of states that have enacted "Son of Sam laws modeled after section 632-a":

Ala. Code § 41-9-80-84 (1983); Alaska Stat. § 12.61.020 (1980); Ariz. Rev. Stat. Ann. § 13-4202 (1978); Cal. Civ. Cod § 2224.1 (West 1983); Fla. Stat. Ann. § 944.512 (West 1983); Ga. Code Ann. § 17-14-30 to 32 (1979 and Supp. 1982); Idaho Code § 19-5301 (1979); Ind. Code Ann. § 16-7-3.7(1-6) (Burns 1983); Iowa Code ch. 910.15 (1982); Ky. Rev. Stat.

(continued...)

been enacted. See 18 U.S.C. § 3681 (1988). If the constitutionality of this legislation is upheld, the national

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[2/](...continued)
Ann. § 46.1831-3 (West 1982); Mass. Gen. laws Ann. ch. 258A, § 8 (Michie/Law. Co-op 1980); Mo. Rev. Stat. § 595.045.11 (1985); Mont. Code Ann. § 53-9-104(2)(e) (1983); Neb. Rev. Stat. § 81-1836-1842 (Supp. 1986); Nev. Rev. Stat. § 217.265 (1981); N.J. Stat. Ann. § 52-4B-26 (1983); N.M. Stat. Ann. 31-22-22 (1983); Ohio Rev. Code Ann. §2743.81 (Anderson 1982); Or. Rev. Stat. § 147.275 (1985); Pa. Stat. Ann. 71 § 180-7.18 (1984); R.I. Gen. Laws § 12-25.1-1 (1983); 1983 R.I. Pub. Laws 328; S.C. Code Ann. § 15-59-40 to 80 (Law. Co-op Supp. 1982); S.D. Codified Laws Ann. § 23A-28A-1 to 14 (Supp. 1982); Tenn. Code Ann. § 29-13-201 to 208 (1980); Tex. Civ. Code Ann. 8309 § 1-18 (Vernon 1980); Wash. Rev. Code Ann. § 7.68.200 to 280 (West Supp. 1982); Wis. Stat. Ann. § 950.04 (2A) (West Supp. 1984).

See also Colo. Rev. Stat. § 24-4.1-201 (Supp. 1987); Conn. Gen. Stat. Ann. § 54-218 (West 1985); Del. Code Ann. tit. 11, § 9103 (1987); Ill. Ann. Stat. ch. 70, para. 403 (Smith- Hurd Supp. 1988); Kan. Stat. Ann. § 74-7319 (Supp. 1987); Mich. Comp. Laws Ann. § 780.768 (West Supp. 1988); Minn. Stat. Ann. § 611A.68 (West 1987); Wyo. Stat. Ann. § 1-40-112(d) (1988).

consequences will be immense: film-makers' First Amendment rights will be restricted, public understanding of crime will be limited, and crime victims will not make any significant gains.[3/] As the Court recently stated in Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988), "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . . We therefore have been particularly vigilant to insure that

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[3/] As the dissenting opinion in the court below noted, the possibility of victims recovering under New York's restitution statute renders the Son of Sam law's actual benefit to victims very questionable. See Petition for Certiorari, Appendix 25a [hereinafter cited as "App"]. In addition, the possibility of tort suits by victims, in which all of the defendant's assets would be subject to any recovery, makes the "Son of Sam" law's benefit questionable.

individual expressions of ideas remain free from governmentally imposed sanctions."

All parties have consented to the filing of this brief.[4/]

II. SUMMARY OF ARGUMENT

There are numerous examples of well-known motion pictures that depict "real life" crimes and persons who have committed crimes. The New York "Son-of-Sam" law and its progeny around the country burden and obstruct a studio's ability to make such films. If the decision below stands, the "Son-of-Sam" law will be allowed to create a new and

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[4/] See Letter from Charles S. Sims to David E. Kendall (January 17, 1991) (granting consent of petitioner) (submitted herewith); Letter from Robert Abrams to David E. Kendall (January 10, 1991) (granting consent of respondents) (submitted herewith).

additional category of unprotected speech, recognition of which will adversely affect the free expression of film-makers in at least three ways: suppression of some works; bowdlerization of some works; and legal controversies with respect to some works for which releases must be obtained from persons subject to the "Son-of-Sam" law, resulting in suppression.

It is plain that, under numerous precedents of this Court, limitations on the power of a would-be speaker to make payments in connection with expressive activity triggers strict scrutiny. The rationale of the court below will not withstand the strict scrutiny which that court recognized was properly applicable. The fact that speech is about crime, as defined in the New York statute, does not

provide a basis for burdening or restricting it.

To produce an accurate and effective "crime film," the film-maker often needs access to the thoughts and descriptions of the person who was directly involved with the crime. Indeed, critically acclaimed films about crime have entailed payments to the criminals, and filmed presentation of matters of indisputable public interest and political importance may depend on the willingness of participants in criminal acts to disclose their thoughts and emotions. "Son-of-Sam" laws make it more difficult for film-makers to work with crucial sources, who will require compensation, and thereby reduce the flow of ideas and information to the public.

III. ARGUMENT

A. The "Son-of-Sam" Law Is an Unjustifiable Content-Based Regulation of Expression.

Amicus' members have an interest in making films about crime and criminals, both to inform and to entertain the public. Such films as "I Want to Live!", "Birdman of Alcatraz," "The Thin Blue Line," "All the President's Men," "GoodFellas", "Missing," "Inherit the Wind," "Lenny," "Mississippi Burning," "Born on the Fourth of July," "Blood Feud," "Reversal of Fortune," "Dog Day Afternoon," "Serpico," "Matewan," and "The Front" are only a few examples of films containing accounts of "real life" crimes and persons who have committed crimes. The New York "Son-of-Sam" law and its progeny around the country burden and obstruct a

studio's ability to make such films. Due to the First Amendment, categorical content-based restrictions on film-makers' freedom of expression are rare.[5/] Obscenity is the principal judicially recognized category of unprotected speech relevant to films.[6/]

If the decision below stands, New York Executive Law § 632-a will be allowed to create a new and additional category of unprotected speech: speech that (i) involves a contract with a person who has been charged with, or convicted of, or who has admitted, a

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5/ See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (striking down blasphemy law); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (striking down law requiring public notification of expression deemed "indecent or impure" or "manifestly tending to the corruption of youth").

6/ Cf., e.g., Jenkins v. Georgia, 418 U.S. 153 (1974).

crime, and that (ii) constitutes the "reenactment" of the crime or "the expression of the thoughts, feelings, opinions or emotions [of the person] regarding such crime" (§ 632-a(1)). There is no precedent for recognition of any such category of speech that is subject to burdensome governmental restrictions.

Recognition of this new category of unprotected speech will adversely affect the free expression of film-makers and others in at least three distinct ways.

First, it will lead to suppression of a work where (i) the raison d'etre of the work is the presentation of the reenactment of a crime or the thoughts, feelings, etc. of the person who committed the crime, and

(ii) the work cannot be made without a contractual arrangement with the person who committed the crime.

Due to the broad but also ambiguous sweep of the New York statute, film-makers are likely to be deterred from embarking on certain types of projects to avoid the risk that an expensive production will be entangled in litigation or subject to disputes with state agencies administering "Son-of-Sam" laws. It will often not be possible to determine whether an individual is subject to a particular statute. In New York, for example, the statutory term "convicted" person is expansively defined to include a person deemed by the New York State Crime Victims Board to have "voluntarily admit[ted]" the commission of a crime. § 632-a.10(b). Indeed, in

the present case, Henry Hill was held subject to the "Son-of-Sam" law not because he had been convicted of any crime (indeed, he had been immunized) but because the Crime Victims Board ruled that Wiseguy "contains thoughts, feelings, opinions and emotions regarding crimes committed by Henry Hill as well as his admission to involvement in such crimes" (50a).

Second, it will lead to the bowdlerization of a work where the presentation of the reenactment of a crime or the thoughts, feelings, etc. of the person who committed it is not central to the work (though such a presentation may be necessary to an accurate or fully informative

presentation).[1] "Son-of-Sam" laws will operate to distort and truncate the content of films as well as to deter them entirely. In the district court, the President of G.P. Putnam's Sons describes in an affidavit how a recent book by a celebrity was bowdlerized due to concern about the application of a "Son-of-Sam" law:

> "We felt compelled to severely restrict any discussion of the crime in order to avoid the snare of another state's "Son-of-Sam" law. Full treatment of the crime would have added credibility to the main

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[1] For example, in a filmed biography or a filmed version of an historical event made with the paid assistance of a participant in the events depicted, a desire to avoid the application of a "Son-of-Sam" law might lead the film-maker to censor out any depiction of criminal conduct, even though such a depiction might contribute to a fuller understanding of the subject matter of the film.

> subject of the book and increased significantly the book's general interest. However, we and the author did not wish to run the risk of being caught up in the bureaucratic maze of "Son-of-Sam" procedures."

(CA App. 128.)

Third, it will lead to suppression of, or legal controversies with respect to, a work with respect to which (i) it is arguable that a release should be obtained from a person who may, with respect to the film, have a claim for commercial appropriation, or defamation[8/], but (ii) because that person committed a crime depicted in the work there is a substantial risk that any

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8/ See, e.g., Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840 (1967); Davis v. Costa-Gavras, 654 F. Supp. 653 (S.D.N.Y. 1987) (libel claim with respect to the film "Missing").

contract with him or her would be subject to a "Son-of-Sam" law. Insurance coverage for many motion pictures requires that such releases be obtained. In many cases, while an accused or convicted criminal's cooperation may not be needed for the production of an accurate film, since the facts are well known or the story is in the public domain, it may nonetheless be necessary to obtain a release, and payment may be necessary to secure it. "Son-of-Sam" laws may make such payments, which are normally not large, illegal, and thereby prevent such projects from going forward.

All three of these speech-restricting effects of the law will be relatively invisible to the general public. The first and third effects are the most severe because they involve

total suppression of works. The second effect is the most insidious because it involves the distortion of works that are produced and that appear to be uncensored.

The court below recognized that § 632-a applies only to contractual payments for expressive activity, and only to expression of a certain kind: "the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes" (App. 11a). Although the statute does not directly prohibit such expression, it is plain that, under numerous precedents of this Court, limitations on the power of a would-be speaker to make payments in connection with expressive activity trigger the same kind of strict scrutiny as does a law that directly prohibits a

certain kind of expression. See Riley, 487 U.S. 781; Meyer v. Grant, 486 U.S. 414 (1988); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

The "Son-of-Sam" laws spring from an understandable objection to the perception of criminals "profiting" further from their crime. The court of appeals considered the speech about crime of a Henry Hill as an "exploitation" of the crime, to the possible detriment of the victims of the crime (App. 13a). That rationale does not withstand analysis. This Court has repeatedly ruled that the mere offensiveness of speech does not justify the imposition of sanctions on it. "If there is a bedrock

principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, _____ U.S. _____, 109 S. Ct. 2533, 2544 (1989). The speech at issue in Hustler could have hardly been more grossly outrageous, but the Court ruled that, in the absence of knowing falsity, there was no remedy for a public figure subjected to such vituperation. For the reasons set forth in the Petition for Writ of Certiorari at 10-16, the "exploitation" rationale of the court below will not withstand the strict scrutiny which that court recognized was properly applicable. But the extraordinary original logic of the New York legislature should not be lost sight

of. The fact that speech is about crime, as defined in the New York statute, does not provide a basis for burdening or restricting it. One lower court has observed that the New York statute was enacted "under the cry of the public for the Legislature to exact retribution,"[9/] while the then unknown "Son-of-Sam" killer was being sought by the police.

B. Film-Makers, Not The Government, Should Determine The Content Of Their Works.

The First Amendment protects the right not only to present a certain viewpoint but also to select "the most effective means for so doing." Meyer, 486 U.S. at 424. To appreciate the significance of the restriction imposed

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9/ In re Johnsen, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (Sup. Ct. Kings County 1979).

on film-makers by laws like the "Son-of-Sam" law, it is helpful to understand the motion picture industry and film-makers' need for access to sources that the statute expansively defines as "criminal."

In this highly competitive industry,[10/] it is well known that, "[i]n recent years, in fact, the marketplace has been willing to pay handsomely for written, filmed, or televised chronicles of crime." N.Y. Times, March 22, 1987, § 7

[10/] Each year work begins on more than three thousand full-length theatrical film projects. See 16 Ingram's No. 5 at 24 (May 1990). In 1989, however, only 472 movies, mostly studio productions at an average cost of approximately $24.5 million dollars, actually appeared in theaters. Id. Most of these movies failed to earn their costs. See L.A. Times, Sept. 23, 1990, at 7 (Calendar). Costs are expected to rise to $30 million per movie in 1990, making it increasingly difficult for film-makers to produce a work that will break even. Id.

at 1, col. 1. The public's unabated interest in "confessions" is concomitant with its apparent revulsion at the sight of criminals apparently profiting from their crimes. Id.

The realities of the marketplace underscore a related fact of film-making: to produce an accurate and effective "crime film," the film-maker often needs access to the thoughts and descriptions of the person who was directly involved with the crime. The criminal arguably is in the best position to explain, e.g., whether the death penalty deters; to account for the role of social conditions in contributing to the crime; to suggest how crime can be prevented; to describe the agony of committing a mercy-killing

of an ailing spouse.[11/] Indeed, NBC

[11/] The cooperation of persons with first-hand knowledge of crime will give the public a more accurate and realistic picture of the true facts of criminal life and may well serve as a better foundation for public action against crime than a fiction writer's imaginings. See George Will, "The Godfather's Hold on America," The Washington Post, (December 30, 1990, at C7):

> "[G]angsters were the preferred expressions of America's busted moral compass, beginning with "Bonnie and Clyde" (1967) . . . In the first two Godfather epics (1972, 1974), the fascination with organized crime was unmistakably tinged with admiration for its organization.
>
> Gangster novels and movies supposedly serve as correctives for American cheerfulness, a salutary reminder of life's dark side. But . . . see "Goodfellas," this year's winner of the best picture award from New York and Los Angeles critics. . . . [a] true story of small-beer

(continued...)

television reportedly paid $50,000 to Roswell Gilbert and his attorney[12/] to make the NBC-TV film, "Mercy or Murder?". See St. Petersburg Times, April 15, 1988 at 2B (Metro and State); Associated Press, Tallahassee, Florida, April 14, 1988 (Nexis, Omni file). Gilbert was

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[11/](...continued)

> mobsters from the 1950s to the 1980s, from criminal squalor to the witness-protection program,. . . [the film] is a corrective to the corrective. The moral of its story is not that America is criminal or is even the 'root cause' of crime, but that the cause of organized crime is criminals who like the life." [emphasis supplied]

[12/] Apparently NBC paid $45,000 to Gilbert's attorney, who had obtained movie rights to Gilbert's life as part of legal fees; $5,000 was paid to Gilbert, who donated that amount to a non-profit institution for Alzheimer's research. See Associated Press, Tallahassee, Florida, April 14, 1988 (Nexis, Omni file).

convicted of murdering his wife. Without the benefit of Gilbert's account of his thoughts and feelings, the film clearly would have been a different -- and in NBC-TV's view, an inferior -- product, and public discussion of and policy-making about mercy-killing issues would have been diminished. Indeed, critically acclaimed films about crime have entailed payments to the criminals. Warner Brothers paid $100,000 to John Wojtowicz, whose 1972 bank robbery became the subject of the movie "Dog Day Afternoon." See N.Y. Times, March 27, 1987. The movie won the Academy Award for "Best Screenplay" (1975). Id.

Matters of indisputable public interest and political importance sometimes involve criminal conduct. Filmed presentation of such matters may

depend on the willingness of participants in criminal acts to disclose their thoughts and emotions. Convicted Watergate felon G. Gordon Liddy contracted with NBC television to grant it the right to transform his 1980 autobiography, Will, into a movie. See R. Snider, Coming Soon to a Theatre Near You, 7 Cal. Lawyer 29, 32 (April 1987). Liddy claimed to have received at least $100,000 from NBC. Id.[13/] To depict most effectively certain aspects of the

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13/ In 1979, Liddy published a spy novel, Out of Control (St. Martin's Press), which also contains passages based on his past experiences as a secret agent. This book, however, is beyond the reach of "Son-of-Sam" laws. That one piece of writing is subject to restriction, while another is not, underscores the content-based nature of "Son-of-Sam" laws.

Watergate scandal,[14/] film-makers understandably wanted the opportunity to present, with a high degree of confidence, the thoughts and feelings of a leading participant. Application of the "Son-of-Sam" law would either have prevented the film from being made or have resulted in a bowdlerized presentation.

This issue is put in starkest terms by the following hypothetical

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[14/] Other Watergate figures also reportedly received payments for television interviews. See, e.g., The Washington Post, February 25, 1978, § 1 at A1 (CBS television paid H. R. Haldeman $25,000 in 1975; ABC television paid Charles W. Colson $10,000 in 1978); M. N. Carter, Associated Press, New York, January 26, 1978 (Nexis, Omni file) (David Frost paid Richard M. Nixon $600,000 plus 20% of profits from interviews in 1977). Similarly, NBC television paid Sirhan Sirhan approximately $15,000 in 1969 for an on-camera interview. See Wash. Post, Feb. 25, 1978, § 1 at A1.

example: in the wake of the most recent presidential election, if a film-maker decides to film the "Willie Horton Story," and the film-maker determines that Willie Horton is a crucial source, and Horton demands payment before he will cooperate, should the government be allowed to erect an impediment to the film-maker's decision to use Horton? "Son-of-Sam" laws pose just such an impediment.

In Riley, Justice Scalia observed that "[c]ompensatory employment is, I would judge, the natural order of things." 487 U.S. at 804 (Scalia, J., concurring in part and concurring in judgment). The Court in Meyer quoted with approval the Colorado Supreme Court's statement that "[w]e can take judicial notice of the fact that it is

often more difficult to get people to work without compensation than it is to get them to work for pay." 486 U.S. at 423. The record below confirms these realities. "Son-of-Sam" laws obviously make it more difficult for film-makers to work with crucial sources, and will limit the number of films that can be made, since many possible sources will refuse to work without compensation, although the exact extent of this phenomenon may not be quantifiable.[15/] These laws will thereby reduce the flow of ideas and information to the public.

[15/] Cf., e.g., N.Y. Times, March 22, 1987 (comment of R. Foster Winans, convicted of federal fraud and conspiracy charges, regarding a contract he entered into to write "Trading Secrets: Seduction and Scandal at the Wall Street Journal": "There would have been a strong economic disincentive if I had thought that the [Son of Sam] law would have applied.")

IV. CONCLUSION

For the foregoing reasons, amicus curiae MPAA respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—against—

RONALD ZWEIBEL, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELIS PETROMELIS, individually and in their capacities as members of the New York State Crime Victims Board,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONER, SIMON & SCHUSTER, INC.

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Preliminary Statement

The Association of American Publishers, Inc. ("AAP") submits this brief, *amicus curiae*, in support of the petition for a writ of certiorari of Simon & Schuster, Inc. ("Simon & Schuster") seeking review of a 2-to-1 decision of the Court of Appeals for the Second Circuit upholding against constitu-

tional attack Section 632-a of the New York Executive Law, New York's "Son of Sam" law.[1]

Interest of the Amicus

AAP, a not-for-profit trade association organized under the laws of the State of New York, is the major national association of book publishers in the United States. AAP's more than 225 members include most of the leading commercial book publishers in the United States, as well as many smaller and nonprofit publishers, university presses and scholarly associations.[2] Among the wide range of general and educational books produced by AAP members are diverse works dealing with the subject of crime. Such works comprehend fact and fiction, span disciplines such as history, sociology, psychology and criminology, and occupy the talents of often distinguished scholars, biographers, journalists, novelists and other authors. Countless additional works published by AAP members on subjects other than crime in some manner touch upon that topic, as a minor but relevant portion of the works.

Simon & Schuster, one of the nation's leading book publishers, urged below that the statutory provisions here in issue, by severely curtailing its and other publishers' ability to publish works dealing with crime, violate the First and Fourteenth Amendments to the United States Constitution. The majority opinion conceded the inhibiting effect of the statute, but nevertheless upheld it based upon its asserted furtherance of the compelling state interest in not rewarding criminals for their "exploitation" of their crimes so long as their victims

1 The parties' written consents to the filing of this brief are being submitted herewith to be lodged with the Clerk of the Court.

2 While Simon & Schuster is a member of AAP, this brief is motivated by the concerns of AAP's members generally as to the adverse impact of Section 632-a of the New York Executive Law upon book publishers and upon the rights guaranteed by the First and Fourteenth Amendments.

"are in need of compensation by reason of their victimization." (13a).[3] While the majority purported to apply "strict scrutiny" to a statute that admittedly burdens speech directly and targets speech of specific content (11a-13a), as Judge Newman's dissenting opinion elucidates, the searching inquiry necessitated to uphold such suspect regulation simply was not engaged in. (19a).

It is of particular importance to AAP's members that the petition for a writ of certiorari be granted in this case. New York is the center of the nation's publishing industry, and home to many of AAP's members. The legislatures of other states have patterned similar "Son of Sam" laws based on New York's "model." The Second Circuit's ruling in this case, if left undisturbed, will not only adversely affect publishing activities subject to the New York statute, but likely will have the effect of legitimizing more than 30 similar statutes in other states. *See* 59a-60a. The result will be to multiply manyfold the "chilling" effect on publication exacted by the New York law.

Moreover, the Second Circuit's facile and unanalytic approach to the "strict scrutiny" standard admittedly called for in reviewing a statute that concededly imposes a direct burden on free expression threatens to erode core First Amendment protections and itself mandates review by this Court.

The censorial impact of New York's Son of Sam law is stark and uncontested. The broad deleterious consequences for book publishers of the ruling below sustaining that law prompts this *amicus* filing.

3 Appendix references are to the appendix to the petition for a writ of certiorari.

Reasons For Granting The Writ

A. THE STATUTE IMPEDES THE CREATION OF IMPORTANT WORKS OF AUTHORSHIP

Section 632-a of the New York Executive Law (herein the "statute" or "Son of Sam" law), which prohibits a publisher from paying monies to an accused or convicted criminal with respect to a work which "reenacts" a crime or conveys that individual's "thoughts, feelings, opinions or emotions regarding such crime" (or from paying any individual who "voluntarily admits" to a crime in his or her writings), and instead requires the publisher to submit such monies to the State to be placed in an escrow fund for five years (55a), poses a direct threat to the creation and vitality of a wide variety of works. The record unequivocally supports this conclusion and the Second Circuit did not dispute it.

Crime has always been a subject of public interest and fascination, and writings about crime are a staple of our literary heritage. It is a core function of the First Amendment to enhance the public's knowledge on matters of public moment—to promote debate and guide our leaders to proper decisions. The statute here in issue—after which similar such statutes in many other states are patterned—would contract that debate, to society's detriment, by limiting the creation of works dealing with crime.

The reach of New York's Son of Sam law is nothing short of astonishing. The withholding of monies applies equally to *accused* and convicted criminals; to the "admi[ssion]" of crime in a writing; and to the most minor allusion to criminal activity in a work otherwise wholly devoted to other subjects.

The scope of works potentially interdicted by the statute is equally breathtaking. *Wiseguy*, published by Simon & Schuster and the immediate impetus for this constitutional challenge, illustrates a genre of works directly exploring the workings of organized crime. The popularity of many such works is unquestioned, as is their contribution to the public's understanding of the criminal underworld.

Many additional works have centered on the lives of notorious criminals, exploring the roots of their criminal careers, and attempting to delve into the criminal mind. Truman Capote's *In Cold Blood* and Norman Mailer's *The Executioner's Song* illustrate this genre of work.

Still other works recount accused or convicted criminals' experiences with the criminal justice system, a system which, the New York Times recently reported, has the highest rate of incarceration in the world. N.Y. Times, Jan. 7, 1991 at 14, col. 1. Some of these works have been directed to the general reading public, others to academic, professional and penological audiences.

Countless works, whose focus is *not* on crime, nevertheless recount "admissions" of prior criminal activity. For example, numerous biographies and autobiographies depict youthful transgressions, use of illegal drugs, wife beatings, and the like. Rarely are such accounts central to the works; they do, however, present a fuller picture of the biographee's background, character, and human frailties.

Works falling in each of the foregoing categories are regularly published by AAP's members. Depending, in any given instance, upon whether a particular publisher determines that the viability and/or vitality of the publishing project calls for authorship by, or collaboration with, an accused or convicted criminal within the meaning of the statute, prospective works within these categories may never be published or, if published, may be radically altered as to content. This is the direct result of the workings of the statute here under challenge.

The statute commands that proceeds, such as a royalty advance, to an accused or convicted criminal (defined to include merely one who voluntarily "admits" to a crime in the writing (57a)) be withheld and instead transmitted to the New York Crime Victims Board to be held in escrow for five years for the benefit of possible victims. The majority opinion below acknowledged that this statutory scheme has the effect of forestalling publishing projects since, "[w]ithout a

financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write." (11a).[4] The record also reveals that, even where publication plans proceed, concern over entanglement with the statute will often lead to editorial alterations unrelated to the merits of the publishing project, a form of self-censorship motivated solely by the costs, burdens, and administrative scheme of the statute. Joint Appendix for the Appeal in the Second Circuit at A73-A129.

The untoward effects of the statute are exacerbated by the fact that all manner of criminal activity comes within its purview—non-violent as well as violent, misdemeanors as well as felonies, federal as well as state, and, indeed, crimes as to which there may not even be any foreseeable victim. Crimes of conscience (*e.g.*, civil disobedience or draft resistance) are treated on the same plane as crimes of wanton violence; admitting to having smoked marijuana triggers the same statutory response as having been convicted for a bank heist.

Without compelling rationale, the statute would extract from AAP's member publishers an extraordinarily high—and in *amicus*' view, a constitutionally impermissible—price. With respect to a wide range of works dealing (whether preponderantly or fleetingly) with a "reenactment" of, or "thoughts, feelings, opinions or emotions" concerning, a crime, the State of New York—along with 34 other states—has sup-

4 The record abounds with evidence that the statute has cast a pall over numerous publishing projects. Affidavits submitted by authors, publishers, and editors detail the numerous publishing projects which prominent publishing houses have determined not to pursue because of concerns over entanglement with the statute, and several which a prominent author, Nicholas Pileggi, has declined to pursue on that same basis. Joint Appendix for the Appeal in the Second Circuit at A73-A129. AAP's members could recite many additional examples of the impact of the statute on publishing projects. In First Amendment cases, the Court regularly takes judicial notice of such likely consequences. *See, e.g., Meyer* v. *Grant*, 486 U.S. 414 (1988); *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

planted its judgment as to publishing suitability for that of authors, editors and publishers.

Precisely this sort of interference with the publishing process has long been viewed as impermissible under the First Amendment. *See Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) ("[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment").

The adverse impact of New York's Son of Sam law and its progeny in other states upon the First Amendment rights of AAP's members and others similarly affected warrants review by this Court of the ruling below.

B. THE STATUTE CANNOT WITHSTAND STRICT SCRUTINY; THE SECOND CIRCUIT'S WATERED DOWN ANALYSIS THREATENS THE VITALITY OF THE FIRST AMENDMENT

As recognized by the Second Circuit, speech in the form of works such as *Wiseguy* is entitled to the highest degree of First Amendment protection. (10a-13a, 19a). Commentary on crime, and its implications for the criminal justice system and the quality of life in our society, is vital and deserving of presentation to the American public from as many perspectives as possible. It is through such educative process that manifold works dealing with various aspects of crime add to our storehouse of knowledge, thereby promoting better societal decisionmaking.[5]

Moreover, it is axiomatic that a statute which "single[s] out the press for special treatment," *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983), almost certainly will not withstand First

5 The broad reach of the statute to encompass works that have little to do with crime overall merely underscores why strict scrutiny is necessary—for in practice the statute interferes with all manner of serious writings, provided solely they touch on a criminal episode.

Amendment scrutiny. The court below recognized that the statute at issue does precisely that. (13a). The especial burdens placed upon book publishers and other media representatives—in attempting to comply with the vagaries of the statutory scheme, in determining whether to publish at all in the face of the law, and, if so, how to tailor a book's contents so as to keep a project viable—cannot be justified and must surely give rise to the inference "that the goal of the regulation is not unrelated to suppression of expression," a goal which is "presumptively unconstitutional." *Id.* at 585.

By prohibiting payments to accused or convicted persons due under media contracts covering expression of "thoughts, feelings, opinions or emotions" regarding a crime or containing a "reenactment" of a crime, the New York statute can be applied only after the speaker has been identified and the content of the work has been reviewed. As such, the crippling shortcoming of this scheme is that it interferes with long established First Amendment rights: it is both a content-based restriction which is unconstitutional on its face, *see Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content")[6]; and a statute which exacts an impermissible burden on publishers and authors wishing to create and publish works beneficial to society, *see Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. at 585 (1983) (a statute imposing a tax only upon the press, which differed in application among members of the press based upon content related characteristics, was held unconstitutional and found to present a threat of press censorship).[7]

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6 *See also Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974) (a Florida statute creating a right of reply in newspapers was held unconstitutional and found to "exact[ ] a penalty on the basis of the content of a newspaper").

7 *See also First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue").

Recognizing these direct burdens upon speech, the court below concluded that the statute must fall unless it withstood strict scrutiny. In this regard, its reasoning was unassailable. Regrettably, in purporting to apply the strict scrutiny standard, it did little more than defer to the facial language of the statute, failing utterly to place the statute under the skeptical analytical light that its speech encumbrances require.

The majority below concluded that in pursuit of its goal of compensating crime victims, New York may escrow payments to criminals which flowed from books, movies, and articles written about their crimes because such practice would indeed benefit crime victims, the ultimate goal of the statute. The court altogether avoided the strict scrutiny inquiry—whether the statute's distinctions, which were found to be both media- and content-based, were *necessary* to serve a compelling state interest *and narrowly tailored* to meet that end. *See also Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 231 (1987); *Perry Educ. Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983). Instead, and in essence, the Second Circuit appears to have been satisfied to find a rational relationship existing between the statute's ends and means.

The fundamental flaw in the Second Circuit's reasoning was pointed out in Judge Newman's dissent. By defining the State's interest being advanced in terms of the statute's stated scope, the majority reached the circular conclusion that the scope of the statute was precisely tailored to the state's objective. This analysis "eliminate[d] the entire [strict scrutiny] inquiry concerning the validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech." (20a-21a).

This Court has routinely refused to compromise the watchful eye of the strict scrutiny test. In *Carey* v. *Brown*, 447

U.S. 455, 465 (1980), this Court rejected the argument that the statute there at issue was valid simply because prohibiting non-labor picketing in residential neighborhoods satisfies the objective of protecting residential privacy. Applying the proper, more searching analysis, this Court found the State's interest insufficient to justify the burdens it placed on the First Amendment. "[N]othing in the content-based labor–nonlabor distinction has any bearing whatsoever on privacy. . . . Standing alone, then, the State's asserted interest in promoting privacy of the home is not sufficient to save the statute." *Id.*

Meyer v. *Grant*, 486 U.S. 414 (1988), involved review of a statutory scheme prohibiting the use of paid petition circulators. Had this Court adopted the logic employed by the Second Circuit, it could have found that the State's interests in protecting the integrity of the initiative process were satisfied by the statutory scheme. This Court properly rejected such argument as insufficient, holding that it is not enough that the challenged scheme *satisfies* the state's goals. Instead, the strict scrutiny standard requires that the resulting burden on protected expression be shown to be *necessary* to fulfill the state's concerns. *Id.* at 426.

The Second Circuit's failure to apply strict scrutiny to New York's Son of Sam law should not escape this Court's review. When dealing with the precious and fragile rights afforded by the First Amendment, there can be no tolerance for a watering down of the safeguards erected by this Court designed expressly to protect the exercise of those rights. The careless (and ultimately callous) approach of the Second Circuit majority toward the protection of such rights requires prompt correction by this Court.

Conclusion

By allowing the State of New York effectively to curtail the creation of many works dealing with crime, and otherwise to influence the manner in which such works may be written

and their contents, New York's Son of Sam statute strikes at the heart of publishing autonomy guaranteed by the First and Fourteenth Amendments. The consequence of the Second Circuit's ruling will be that speech of substantial social value will never reach the public. This result will be brought about, moreover, in circumstances where there has been no showing of a compelling need for such curtailment.

The censorial effects of New York's Son of Sam law are particularly severe insofar as New York is the very center of this country's publishing industry. Not only will continued application of the statute inhibit New York-based publishing activities; it will also influence the practices of many other states which follow the pattern established by the New York law.

AAP urges this Court to take advantage of this opportunity to address a consequential issue for book publishers and others, and, through review and reversal of the ruling below, to eliminate an undue and unnecessary burden on free speech.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 28, 1990
CERTIORARI GRANTED FEBRUARY 19, 1991

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
87 Civ. 5582

1.	Complaint filed, summons issued.	August 3, 1987
3.	Defendants' answer filed.	August 24, 1987
6.	Plaintiff's notice of motion for summary judgment and supporting papers filed.	December 21, 1987
10.	Defendants' notice of cross-motion for summary judgment and supporting papers filed.	March 15, 1988
27.	Transcript of September 19, 1988 oral argument filed.	November 10, 1988
28.	Opinion and order denying plaintiff's motion for summary judgment and granting defendants' cross-motion for summary judgment and dismissing complaint.	October 26, 1989
29.	Judgment entered for defendants.	October 30, 1989
31.	Notice of appeal.	November 17, 1989

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
No. 89-9192

	Opinion and judgment filed.	October 3, 1990

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SIMON & SCHUSTER, INC.,

Plaintiff,

— against —

RONALD ZWEIBEL, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE McGRATH, and ANGELIS PETROMELIS, individually and in their capacities as members of the New York State Crime Victims Board,

Defendants.

Civil Action No.
87 Civ. 5582
(RJD)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTORY STATEMENT

1. This is a civil action brought under 42 U.S.C. Section 1983 seeking declaratory and injunctive relief regarding New York Executive Law Section 632-a. Commonly referred to as "the Son-of-Sam law," Section 632-a requires a publisher contracting for a book with any person who has been accused or convicted of a crime to pay over to the New York State Crime Victims Board ("the Board") any monies owing to such person if the book contains a "reenactment" of the crime, or an expression of that person's thoughts, feelings, opinions or emotions regarding the crime. Because the application of Section 632-a to any particular book depends on the book's content, because it targets for special adverse treatment only those assets of or due to an accused or convicted criminal which derive from the exercise of the right of freedom of speech and of the press, and because in practice it effectively precludes the publication of certain books, the law violates the First Amendment to the United States Constitution. Plaintiff Simon & Schuster, Inc. ("Simon & Schuster") seeks a declaration that Section 632-a violates the First Amendment on its face and as applied, and an injunction barring its continued enforcement.

II. JURISDICTION

2. This Court has jurisdiction of this action by virtue of 28 U.S.C. Sections 1331 and 1343(3), conferring jurisdiction over claims brought under 42 U.S.C. Section 1983 to enforce rights guaranteed by the United

States Constitution. Declaratory relief is authorized by 28 U.S.C. Sections 2201 and 2202, and attorneys' fees are authorized by 42 U.S.C. Section 1988.

3. Venue is proper in this district under 28 U.S.C. Section 1391(b).

III. PARTIES

4. Simon & Schuster is and at all relevant times has been a corporation organized and existing under the laws of the State of New York, with its principal place of business in the City, County, and State of New York. Simon & Schuster has for more than fifty years been one of this nation's leading and most respected book publishers. In addition to its other publishing activities, Simon & Schuster publishes biographies, autobiographies, and other works of non-fiction relating to or touching upon events that may constitute crimes in the State of New York. Simon & Schuster published the hardcover edition of Nicholas Pileggi's book on organized crime in America, entitled *Wiseguy*, in 1985. (A copy of *Wiseguy*, Exhibit A hereto, is being lodged with the Clerk of the Court.) Among the other books published by Simon & Schuster that concern events that may constitute crimes and were written by persons admitting to or convicted of crimes are *Blind Ambition* by John Dean and *Witness to Power* by John Erlichman.

5. Defendant Ronald A. Zweibel is Chairman of the New York Crime Victims Board, an agency of the State of New York created by New York Executive Law Section 622. Defendants Gennaro Fischetti, George L. Grobe, Jr., Diane McGrath, and Angelis Petromelis are the additional members of the Board. The Board is charged by law with the responsibility of enforcing Section 632-a. At all relevant times, defendants have acted under color of state law.

IV. FACTUAL ALLEGATIONS

6. In early 1981, Simon & Schuster became aware that Henry Hill, who had been a career criminal and involved in organized crime since he was a youth, was talking to federal prosecutors as part of the Witness

Protection Program. Executives at Simon & Schuster conceived the idea of publishing a book that would provide for the first time an inside look at life in "the mob" and would show what working for the mob actually entailed. The book Simon & Schuster envisioned would be an antidote to other books romanticizing organized crime.

7. Michael Korda, editor-in-chief at Simon & Schuster, thereupon contacted the Sterling Lord Agency, Inc. ("Sterling Lord"), a literary agency in New York, and asked Sterling Lord for assistance in finding an appropriate author for a book using Hill's story. Sterling Lord suggested to Korda that Nicholas Pileggi, one of its clients, a well-known journalist and writer about organized crime, would be an ideal author for the book. Pileggi had previously written articles on crime, organized crime, and municipal corruption for *The New York Times Magazine*, *Esquire*, *Reader's Digest*, *Life Magazine*, and *New York Magazine*, as well as a well-reviewed book on the life of a private detective entitled *Blye, Private Eye*.

8. Korda met with Pileggi concerning the proposed project. They discussed a book that would be an inside look at growing up in the mob, describing for readers how the mob operates and the daily life of its participants, a book quite different from anything then available.

9. Hill's cooperation and participation were essential for the book Simon & Schuster envisioned, and Pileggi and Simon & Schuster were informed that Henry Hill was willing to cooperate if, and only if, he were paid for his story. Before Pileggi committed himself, he had lengthy discussions with the chief of the federal organized crime strike force in the United States Attorney's Office in the Eastern District of New York; FBI agents in the Queens, New York, Office; a Nassau County Police detective; and Thomas Puccio, then an Assistant United States Attorney in the Southern District. In light of Pileggi's intention to portray the realities of a life of crime, these individuals, who were familiar with Henry Hill, agreed to cooperate with Pileggi should he decide to create the proposed work.

10. On August 21, 1981, Pileggi entered into a written agreement between himself, Sterling Lord, and Hill concerning the preparation and

sale of a book to be authored by Pileggi concerning Hill's experience with organized crime. Under that agreement, Sterling Lord agreed to act as the literary agent for Pileggi and Hill. (A copy of that agreement as annexed to the Board's order, hereafter "the August 1981 Agreement," is attached hereto as Exhibit B.)

11. On September 1, 1981, Simon & Schuster, Pileggi, and Hill entered into an agreement ("the Publishing Agreement") for an autobiographical non-fiction work "about the Mafia." (A copy of that agreement as annexed to the Board's Order is attached hereto as Exhibit C.) Under the Publishing Agreement, Simon & Schuster was to pay specified monies to Sterling Lord for the benefit of Pileggi and Hill. Sterling Lord was to retain a standard literary agent's fee of ten percent of any and all monies payable to Pileggi and Hill.

12. In January 1986, Simon & Schuster published *Wiseguy*. As Simon & Schuster described the book in the inside jacket:

> *Wiseguy* is the life story of Henry Hill, a career criminal who literally grew up in the mob. For the first time, often in Hill's own words, the reader is swept into the day-to-day workings of a life of crime, from the truth about the Lufthansa heist (and the ten murders which follow) to the inside story of the Sindona case — which nearly caused the collapse of the Vatican Bank — as well as the Boston College point-shaving scandal and countless other infamous crimes, all brought to life by a major player in the deadly high-stakes game some people call the Mafia.
>
> In *Wiseguy*, Nick Pileggi shows the reader the bitter truth about professional crime in America.
>
> This is no "guided tour." The reader is taken deep inside the inner workings of organized crime, a trip made possible only by the investigative skills of an expert — and the cooperation of one of the criminals.
>
> *Wiseguy* is more extraordinary — and more compelling — than any novel. It is a firsthand account of a secret world, more brutal and far more fascinating than any of the novels that have glamorized it, and it is based on the searing testimony of a man who has run-and-done it all.

13. *Wiseguy* was well reviewed and widely acclaimed as a skilled and revealing book on an important subject which had not previously been adequately addressed. The reviews commended the work for de-mystifying and de-glamorizing the activities of organized crime. Jimmy Breslin writing in the *New York Daily News* called *Wiseguy* "the best book on crime in America ever written." The *Washington Post* called *Wiseguy* an "amply detailed and entirely fascinating book that amounts to a piece of revisionist history"; the *Kansas City Star* termed it "a compelling look at the blue collar criminal . . . as coldly factual as a news story." To date *Wiseguy* has sold more than 90,000 copies in its trade edition. Simon & Schuster published a softcover edition of *Wiseguy* in February 1987, and to date more than 1,000,000 copies are in print.

14. New York Executive Law Section 632-a is directed solely at monies earned by the exercise of the right of expression. It applies to every contract for a book, movie, or magazine article with a person accused or convicted of any crime in New York with respect to the "reenactment" of a crime or to the accused or convicted person's expression of thoughts, feelings, opinions or emotions regarding a crime. Persons who admit the commission of crimes in such works are considered as having been "convicted", even if they are not prosecuted. Section 632-a requires payment to the Board of any monies which would otherwise be owing under the contract to the person so accused or convicted or to his representatives. The Board is required to deposit such monies in an escrow account for the benefit of any victim of any crimes committed by such person. Monies from the escrow fund are payable to a victim if (and only if) the victim recovers a money judgment for damages against such person in a civil action commenced within five years of the date of the establishment of the escrow fund. Unless any victim commences an action, the funds are returned after being held for the five-year period. Section 632-a does not require that any assets of such persons except those deriving from the exercise of the right of expression be held for the benefit of such

victims, and books by such persons on subjects other than their crimes are not subject to its application. (A copy of Section 632-a is attached hereto as Exhibit D.)

15. By letter of January 31, 1986, the Board requested Simon & Schuster to provide it with a copy of the Publishing Agreement and certain other information concerning *Wiseguy*. The Board's letter also contained a sweeping request for copies of all of Simon & Schuster's contracts on any books subject to Section 632-a; the names of any accused or convicted criminals, suspected assignees or representatives with whom Simon & Schuster was dealing; information concerning payments to any such persons; the description, location and dates of any crimes committed; and the names of any known victims of any crimes related in any such proposed books. (A copy of that letter is attached hereto as Exhibit E.) After discussions between the Board and Simon & Schuster, the Board narrowed its request to matters involving *Wiseguy*, and on May 22, 1986, Simon & Schuster provided all of the information requested.

16. On June 15, 1987, the Board served on Simon & Schuster a Proposed Determination and Order, which by its terms becomes final thirty days after its service if no fact-finding hearing were requested. No hearing was requested, and the Order therefore became final as to Simon & Schuster on July 15, 1987. (A copy of that Order is attached as Exhibit F.) In the Order, the Board concluded that *Wiseguy* is subject to Section 632-a because it contained Hill's thoughts, feelings, opinions and emotions regarding, and admission to participation in, criminal activity; that Simon & Schuster violated Section 632-a by failing to turn over to the Board the Publishing Agreement in September 1981; and that Simon & Schuster violated Section 632-a by paying $96,250 to Sterling Lord for the account of Henry Hill. The Board ordered Simon & Schuster to turn over to it the additional monies payable to Hill currently held by Simon & Schuster, as well as any and all future royalties or other monies which would become payable to Hill or Sterling Lord. The Board further ordered Simon & Schuster to turn over $96,250, the amount which it had previously paid to Sterling Lord for Hill, in the event that Henry Hill failed to promptly turn over that sum to the Board. Sterling Lord was ordered to pay to the Board

all monies it received or will receive on Hill's account, as well as the monies it received as Hill's representative.

17. The Board's enforcement of Section 632-a against publishers, including Simon & Schuster, interferes with the publication of biographies, autobiographies and other works of non-fiction on some of the most pressing social issues of the day, by effectively prohibiting the compensation of a class of authors, sources, and literary agents. Publishers could not have paid, or would have been deterred from paying, compensation to commission such critically acclaimed and socially useful works as Eldridge Cleaver's *Soul on Ice*, *The Autobiography of Malcolm X*, Martin Luther King, Jr.'s *Where Do We Go From Here?*, Henry David Thoreau's *On Civil Disobedience*, Norman Mailer's *The Armies of the Night*, John Erlichman's *Witness To Power*, and John Dean's *Blind Ambition* under section 632-a or statutes like it in other jurisdictions.

18. Defendants have caused and are continuing to cause Simon & Schuster damage and irreparable harm by (1) impairing Simon & Schuster's ability to enter into and perform contracts providing for payments to certain authors or other persons whose paid cooperation is essential for the publication of certain works; (2) ordering Simon & Schuster to pay to the Board a sum of money equal to any sums previously paid to Sterling Lord or Hill, and (3) ordering Simon & Schuster to pay to the Board monies that will become due Sterling Lord and Hill.

19. Simon & Schuster is in genuine doubt concerning its First Amendment rights to publish books and to make necessary payments for such books, and the inconsistent obligations precluding such payments that the Board asserts are imposed by Section 632-a. Plaintiff requires and seeks declaratory relief to resolve that dilemma. Plaintiff has no adequate remedy at law.

V. CAUSES OF ACTION

20. Section 632-a violates Simon & Schuster's right of freedom of speech and of the press under the First Amendment to the United States

Constitution, made applicable to the states by the Fourteenth Amendment, in the following respects:

a. The Board's application of Section 632-a to any work depends on the topic and contents of the work, in violation of the First Amendment's prohibition of content-based regulation of speech;

b. Section 632-a targets only assets derived from the exercise of constitutionally protected activity, and not any assets derived from non-protected activities, in violation of the First Amendment's prohibition of differential regulation of First Amendment activity;

c. Section 632-a is substantially overbroad, interfering with the right to commission and obtain books for publication and sale, in violation of the First Amendment's prohibition of restraints on freedom of the press; and

d. Section 632-a was intended to and does deter the creation and publication of books about crime written by or with the assistance of persons who admit or are convicted or accused of crimes.

21. Section 632-a violates Simon & Schuster's right not to be deprived of liberty or property without due process of law by its vagueness and failure to provide sufficiently definite guidance as to which contracts or books fall within its purview, in violation of the First and Fourteenth Amendments to the United States Constitution.

VI. PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests:

1. An order declaring Section 632-a unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States, on its face and as applied;

2. An injunction prohibiting defendants and their agents, successors and employees from taking any steps to apply or enforce Section 632-a;

3. An order awarding plaintiff costs and attorneys' fees, pursuant to 42 U.S.C. Section 1988; and

4. Such other and further relief as the Court may deem just and proper.

August 3, 1987

/s/

RONALD S. RAUCHBERG
CHARLES S. SIMS
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022
(212) 909-7032

Attorneys for Simon & Schuster, Inc.

CAPTION OMITTED

ANSWER

Defendants RONALD ZWEIBEL, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE McGRATH, and ANGELIS PETROMELIS, by their attorney ROBERT ABRAMS, Attorney General of the State of New York, for their answer to the complaint, respectfully allege:

1. Lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11 and 13 of the complaint.

2. Admit the allegations contained in paragraph 5 of the complaint, except deny that defendant Ronald A. Zweibel is currently Chairman of the New York State Crime Victims Board ("the Board").

3. Lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the complaint and refer to the book *Wiseguy*, filed with the Court as Exhibit A to the complaint, for an appropriate characterization thereof.

4. Deny the allegations contained in paragraph 14 of the complaint but refer to the applicable statute for an appropriate characterization thereof.

5. Admit the allegations contained in paragraph 15 of the complaint but refer to the Board's letter, annexed as Exhibit E to the complaint, for an appropriate characterization thereof.

6. Admit the allegations contained in paragraph 16 of the complaint, except allege that the proposed order did not become final because of objections filed by interested parties other than plaintiff.

7. Lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the complaint, but deny that the Board interferes with the publication of any books.

8. Deny the allegations contained in paragraph 18 of the complaint and refer to the Board's proposed order, annexed as Exhibit F to the complaint, for an appropriate characterization thereof.

9. Deny each and every allegation contained in paragraphs 19, 20 and 21 of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE,

10. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE,

11. Plaintiff lacks standing to challenge the constitutionality of Executive Law § 632-a.

WHEREFORE, defendants demand judgment dismissing the complaint, together with the costs of this action.

Dated: New York, New York
August 24, 1987

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendants
By:

/s/

DOUGLAS D. ARONIN
Assistant Attorney General
120 Broadway
New York, New York 10271
(212) 341-2621

TO: CHARLES S. SIMS, ESQ.
Proskauer Rose Goetz
& Mendelsohn
Attorneys for Plaintiff
300 Park Avenue
New York, New York 10022

CAPTION OMITTED

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon accompanying affidavits of Elizabeth A. McNamara, Michael Korda, Nicholas Pileggi, Sterling Lord, Gerald E. Hollingsworth, Jan F. Constantine, Jason McManus, and Phyllis E. Grann, the exhibits annexed thereto, the Rule 3(g) Statement submitted herewith, and upon all prior papers and proceedings in this action, plaintiff will move this Court, before the Honorable Richard J. Daronco, United States District Judge for the Southern District of New York, in Courtroom 414 of the United States Courthouse, New York, New York, at 9:00 a.m. on the 21st day of March, 1988, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting plaintiff summary judgment on its claim that the New York Executive Law Section 632-a violates the First and Fourteenth Amendments to the United States Constitution on its face and as applied. There are no genuine issues of material fact and plaintiff is entitled to judgment as a matter of law. The grounds for this motion are more fully set forth in the affidavits and memorandum of law submitted herewith.

Dated: New York, New York
December 21, 1987

Yours, *etc.*

PROSKAUER ROSE GOETZ
& MENDELSOHN

/s/

300 Park Avenue
New York, New York 10020
(212) 909-7000

To:

Douglas Aronin, Esq.
Assistant Attorney General
120 Broadway
New York, New York 10271

CAPTION OMITTED

AFFIDAVIT OF ELIZABETH A. McNAMARA

Elizabeth A. McNamara, being duly sworn, deposes and says:

1. I am an associate counsel of Simon & Schuster, Inc. I make this affidavit on behalf of Simon & Schuster, in support of its motion seeking summary judgment for declaratory and injunctive relief against New York Executive Law Section 632-a, the so-called Son of Sam law.

2. Simon & Schuster is the publisher of *Wiseguy*, by Nicholas Pileggi. (A copy of *Wiseguy*, Exhibit 1 hereto, is being lodged with the Clerk of the Court.) Since the New York State Crime Victims Board's initial inquiry in January 1986 concerning *Wiseguy*, I have been involved in preparing Simon & Schuster's response to the Board's inquiries concerning *Wiseguy*. I make this affidavit on personal knowledge.

Section 632-a

3. New York Executive Law Section 632-a applies to every contract for a book, movie, interview, and magazine article with a person "accused" or "convicted" of any crime with respect to the "reenactment" of a crime or to the accused's thoughts, feelings, opinions, or emotions regarding a crime. Section 632-a(l). The statute defines "convicted" to include persons who "voluntarily admit" the commission of crimes (apparently even indirectly, by discussion of facts or events in literary writings) but who are not prosecuted, as well as persons acquitted by reason of mental disease or defect. Section 632-a(5), 10(b).

4. Section 632-a requires that each such contract be provided to the Board, and prohibits payment of any monies owing under the contract to the accused or convicted person or to his representative; such payments must instead be made to the Board. Section 632-a(1). The Board is required to deposit such monies in an escrow account for the benefit of any victim of any crimes committed by such person. *Id.* Monies from the

escrow fund are payable to a victim only if and when the victim recovers a money judgment for damages against the accused in an ordinary civil tort action commenced within five years of the date of the establishment of the escrow fund. *Id.* If no victim commences an action within the five-year period, the funds are returned to the accused or convicted person. Section 632-a(4).

5. Section 632-a applies only to contracts whose performance consists of the exercise of the rights of free speech and free press. A contracting party is not required to turn any assets over to the Board for the benefit of victims of an accused or convicted person except those assets deriving from the exercise of the right of expression. Section 632-a(1). And it applies only to contracts for expression on a particular subject — the crime which the accused or convicted person is said to have committed. *Id.*

The Board's Application of Section 632-a to *Wiseguy*.

6. On September 1, 1981, Simon & Schuster, Nicholas Pileggi, and Henry Hill entered into an agreement ("the Publishing Agreement") for a work about organized crime. (A copy of that agreement was annexed as Exhibit A to the Board's Proposed Determination and Order concerning *Wiseguy*. A copy of the Proposed Determination and Order with annexed exhibits is attached hereto as Exhibit 2.) Under the Publishing Agreement, Simon & Schuster acquired specific literary rights in the work and agreed to pay specified monies to Sterling Lord, literary agent for Pileggi and Hill, for their benefit. Sterling Lord was to retain a standard literary agent's fee of ten percent of the monies payable to Pileggi and Hill. The financial arrangements embodied in the Publishing Agreement, providing for payment of advances and periodic payment of royalties as earned, accorded with standard industry practice.

7. Agreements to compensate both a writer and a primary source (one who spends substantial time providing information to an author) for a book to be published are common practice both for Simon & Schuster and the publishing industry generally.

8. By letters to Simon & Schuster and Nicholas Pileggi dated January 31, 1986 the Crime Victims Board directed Simon & Schuster to provide extensive information concerning *Wiseguy* and any other unspecified projects that were potentially subject to Section 632-a. (Copies of those letters are attached as Exhibits C and D to Exhibit 2.) After discussions between the Board and Simon & Schuster, the demand was narrowed to matters involving *Wiseguy*, and in May 1986 Simon & Schuster provided the Board with all of the information requested. The Board's letter further asked that all payments in connection with *Wiseguy* be suspended. Simon & Schuster complied with this request by suspending payment of all sums due Henry Hill.

9. After a year's consideration, the Board issued its Proposed Determination and Order concerning *Wiseguy* on May 27, 1987 and served Simon & Schuster on June 15, 1987. That Order by its terms was to become final thirty days after its service on Simon & Schuster, that is, on July 15, 1987, unless a fact-finding hearing was earlier requested. *See* Order, Exhibit 2. Simon & Schuster did not request such a hearing, and received no notice of any such request prior to July 15, 1987 by any other person. We have, moreover, been informed by counsel for defendants that no hearing was requested prior to July 15, 1987.

10. The Board's Order directs Henry Hill to pay to the Board all monies previously received from Simon & Schuster under the Publishing Agreement; if Hill fails to comply within 30 days of the Order becoming final, Simon & Schuster is directed to pay those sums to the Board. In addition, Simon & Schuster is directed to pay to the Board all monies that will become due to Sterling Lord and Hill in the future under the Publishing Agreement. Pending clarification of its rights in this lawsuit, since the Board's direction to suspend such payments in January 1986, Simon & Schuster has continued to withhold all sums due Henry Hill.

11. Section 632-a impairs Simon & Schuster's ability to conclude contracts that arguably fall within the statute's reach. If presented with a contract proposal that on its face brings the envisioned book within Section 632-a, I would advise our editor and the author (or source) that any monies

due under the contract would be payable to the Board. The inevitable result of that advice is that the author or source will not enter into the contract and the book will not be published. It is my experience — and is clearly the industry standard — that people expect to be, and are, compensated for writing books. If a publisher cannot compensate authors, or must delay the compensation, the book cannot be published. Moreover, the additional burdens on management, editorial and legal resources that potentially covered projects create, will often alone be enough to deter the consideration of such projects.

12. The publication of fewer books is not the only effect of Section 632-a. The statute also affects editorial decisions and will inevitably result in the censorship of certain subjects. Because of the statute's breadth and its vagueness, as an attorney for a publisher I am compelled to give the statute a broad interpretation to avoid publication of a book that falls within its reach. Thus, I am forced to present my client with a difficult, and unprecedented, set of alternatives. As set forth above, we can forego a project that might implicate the Son-of-Sam statute. Alternatively, we can edit and excise any material that might somehow involve an "admission" of a crime or in any way refer to (or reenact) a crime by the author, no matter how long ago or how incidental to the purpose of the book. Lastly, we could submit the contract or the manuscript to the Board for what would be, in effect, a pre-publication review of the content of a book by a governmental agency.

13. As Michael Korda, Simon & Schuster's Editor-in-Chief, very cogently notes in Paragraph 17 of his affidavit, this set of alternatives cannot be consistent with the First Amendment guarantee of freedom of speech and of the press. For the reasons set forth here and in the affidavit of Michael Korda, I respectfully urge this Court to grant Simon & Schuster's motion for summary judgment and an order declaring Section 632-a unconstitutional under the First Amendment.

/s/
Elizabeth A. McNamara

SUBSCRIPTION OMITTED

CAPTION OMITTED

AFFIDAVIT OF MICHAEL KORDA

Michael Korda, being duly sworn, deposes and says:

1. I am editor-in-chief and senior vice-president of Simon & Schuster, Inc. I make this affidavit, based on my own personal knowledge, on behalf of Simon & Schuster, in support of its motion seeking summary judgment for declaratory and injunctive relief against New York Executive Law Section 632-a, the so-called Son of Sam Law.

Simon & Schuster's Publication of *Wiseguy*

2. Simon & Schuster has for more than fifty years been one of this nation's leading and most respected book publishers. In addition to its other publishing activities, Simon & Schuster publishes biographies, autobiographies, and other works of non-fiction relating to or touching upon events that may constitute crimes in the State of New York. Simon & Schuster published the hardcover edition of Nicholas Pileggi's book on organized crime in America, entitled *Wiseguy*, in 1985. Simon & Schuster has published other books concerning events that may constitute crimes and that were written by persons admitting to or convicted of crimes, including *Blind Ambition* by John Dean, considered by many to be the best book written on Watergate, and *Witness to Power* by John Erlichman.

3. In early 1981, I learned that one Henry Hill, who had been substantially involved in the activities of organized crime in New York and who was cooperating with federal prosecutors as part of the witness protection program, was attempting (through his attorney) to see if any publishers might be interested in his story.

4. Richard Snyder, Chairman and Chief Executive Officer of Simon & Schuster, and I then conceived the idea of publishing a book that would provide for the first time an inside look at life in organized crime and would show what working for "the mob" actually entailed. The book we

envisioned would be an antidote to other books romanticizing organized crime. We believed that such a book could be both extremely interesting and commercially workable, *if* the right writer could be found to undertake the project.

5. I contacted Sterling Lord, of the Sterling Lord Agency, Inc., a leading literary agency in New York, and asked him for assistance in finding an appropriate author for a book using Hill's story. Lord suggested that Nicholas Pileggi, one of his clients, a well-known journalist and writer about organized crime, would be an ideal author of the book. Pileggi had previously written articles on crime, organized crime, and municipal corruption for *The New York Times Magazine, Esquire, Reader's Digest, Life Magazine, and New York Magazine*, as well as a well-reviewed book on the life of a private detective entitled *Blye, Private Eye*.

6. I soon met with Pileggi concerning the proposed project, and it became immediately clear that Pileggi — who knew of Hill — shared our belief that in Pileggi's hands, Hill's story was a useful and important one to tell. We discussed a book that would be an inside look at growing up in the mob, describing for readers how the mob operates and the daily life of its participants, a book quite different from anything then available.

7. Henry Hill's extensive cooperation and participation, detailed in the accompanying Declaration of Nicholas Pileggi, were essential for the book Simon & Schuster envisioned. Without Hill's involvement, the book would have lacked the authenticity and bite that it so compellingly has, and that so attracted reviewers and the reading public. But Hill's attorney made it clear that Hill's cooperation was dependent on his being paid for his time and effort.

8. *Wiseguy* was well reviewed and widely acclaimed as a skilled and revealing book on an important subject which had not previously been adequately addressed. The reviews commended the work for de-mystifying and de-glamorizing the activities of organized crime. Jimmy Breslin, writing in the New York *Daily News*, called *Wiseguy* "the best book on crime in America ever written." The *Washington Post* called *Wiseguy* an "amply detailed and entirely fascinating book that amounts to a piece of

revisionist history." The *Kansas City Star* termed it "a compelling look at the blue collar criminal . . . as coldly factual as a news story." (Copies of these and other reviews are attached as exhibit 3.) Two years after its publication, the material in *Wiseguy* was the principal source for a serious analytic essay on organized crime in *The New Republic*. (*See* exhibit 4.) *Wiseguy* has sold more than 90,000 copies in its trade edition. Simon & Schuster published a softcover edition of *Wiseguy* in February 1987 and more than 1,000,000 copies are in print.

Section 632-a Impairs First Amendment Interests

9. Section 632-a has had and continues to have a substantial inhibiting effect on Simon & Schuster's conduct of its publishing business and First Amendment rights. The statute effectively precludes Simon & Schuster from entering into any publishing agreements that could arguably be subject to it, since it purports to foreclose our ability to compensate authors or primary sources pursuant to standard publishing agreements.

10. By forbidding payment to certain writers and sources, the statute necessarily results in some books not being published. In all my years in publishing, I have never seen an author, and rarely a primary source (one who will have to spend substantial time providing information to an author), who would be willing to undertake the necessary tasks without an enforceable promise that he will be paid, and paid promptly. Most authors and primary sources do not have the financial resources to write without promise of recompense; the hours they spend writing rather than at other work are hours for which they need to be remunerated. Yet the statute precludes us from promising to compensate certain authors or sources at all, and prohibits us from paying them advances or royalties on the standard timely basis — making it as a practical matter impossible to conclude an agreement with an author or source.

11. I have no doubt, for example, that John Dean would not have written *Blind Ambition* if we had been unable to compensate him certainly on a timely basis; when he undertook the book he had substantial obligations (including legal bills due) and needed to earn money to meet them. Based on my conversation with Hill's attorney, I do not believe that

Henry Hill would have assisted Nick Pileggi if he understood that we would be unable to pay him for at least five years.

12. Since learning of the claimed scope and legal consequences of Section 632-a as a result of the Board's involvement with *Wiseguy*, I have been compelled to make it my practice to reject any book that will entangle Simon & Schuster in its net. When the Simon & Schuster editorial board discussed a book on the so-called "preppy murderer", Robert Chambers, I announced that we could not consider the book if Chambers would be participating with the author. The same consideration would, as a practical matter, have effectively precluded our publication of a book by (or with the cooperation of) Claus Von Bulow, until his acquittal; would preclude our publication of autobiographical books discussing their recent activities by or with the substantial assistance of Representative Mario Biaggi, Stanley Friedman, Meade Esposito, Ivan Boesky, Bernhard Goetz, former Surrogate Bertram Gelfand, retired Judge Hortense Gabel, Bess Myerson, Oliver North, and Admiral John Poindexter to name just a few of many available examples. The statute effectively precludes the commissioning and publication of these and other potentially valuable works even if, as is likely, the controversy recently addressed in the news about these individuals were to constitute only a small portion of the book. And the statute applies not only after conviction but before it, at a time when the presumption of innocence still applies, so that (for example) Judge Gabel or Bess Myerson may not be paid for writing books maintaining their innocence.

13. The overbreadth of Section 632-a, and the speechdeterring role it plays throughout the publication process, is easily seen by considering how it would apply to a book Simon & Schuster is in the process of grooming for publication, Jesse Jackson's forthcoming autobiography *A Time To Speak*. Like most autobiographical or biographical books subject to Section 632-a, its value — and our interest in publishing it — arises not from any past crime to be exploited for profit, but from the intrinsic interest of the larger life-story the author (here, a candidate for President of the United States) has to tell.

14. It was only when the first chapter of the manuscript was delivered — well after signing a contract and payment of advances — that we realized that the author's story includes past "crimes." The first chapter of the manuscript described Jackson's arrest for trespassing and resisting arrest while he was attempting to be served at a Woolworth's lunch counter. Had a statute like Section 632-a been in force in North Carolina in 1963, Jackson would not have been able to receive advances or other payments upon contracting to write a book about his experience, even a book declaring his innocence of any charges that could constitutionally have been brought against him. Had he been found guilty at that time, a statute like Section 632-a would bar him even now from being paid to write about his experience. (Indeed, if he were arrested for sitting-in tomorrow at the South African consulate in New York, we would be forced to insist that he not add that incident to the nearly-finished manuscript.) Any law that, like Section 632-a, could prohibit the commissioning of autobiographies like Jesse Jackson's (or that compels editorial decisions to delete certain sections) surely infringes the freedom of the press.

15. Simon & Schuster must consider Section 632-a in determining not only whether to publish a book, but also how to edit a book already accepted. Since the Board has held that payments for a book subject to the statute are unlawful even if the contract originally signed was not within the statute, a publisher must carefully review autobiographical and other non-fiction manuscripts for admissions or representations of acts that might constitute crimes, and either stop paying subject authors or sources (and recover any payments previously made for deposit in the Board's escrow fund) or edit the manuscript to excise any portions about the author's supposed crime.

16. Section 632-a's requirement that publishers immediately provide the Board with any contracts that might be subject to it also interferes with freedom of the press by putting publishers in an impossible situation with their writers, or with writers with whom they would like to enter into publishing agreements. What am I to do when a writer who has not been accused or convicted of any crime comes in to discuss a book in which he or she admits to any act which may in the Board's judgment be a crime

subject to the statute? Sign a publishing agreement and immediately notify the state that one of my authors may have committed a crime? Agree to compensate the author on a standard basis, knowing that the Board may direct me to breach the contract? I do not believe it is my function to be — as the Son of Sam law forces me to be — a witness against my authors, or that the government may effectively require a publisher to obtain governmental permission to compensate a category of authors and sources for certain works.

17. Finally, Section 632-a is written in such an inclusive and vague manner that we are unable to determine accurately whether any particular agreement, or manuscript, will eventually be held subject to its reach, and are compelled to steer clear of anything doubtful. In this respect, the impact of the law may be even greater than the legislature intended. Because a publisher who makes a payment that the Board later decides to have been in violation of the statute is subject to legal expenses and required reimbursement that amounts to a substantial fine, publishers are compelled to give the Son of Sam law the broadest scope possible, and to notify the Board and request the advice of a governmental body concerning any doubtful compensation whenever a book may arguably be subject to its terms. No matter when a crime occurred; or how much of a book is devoted to discussion of a crime or whether or not a court might conclude that certain conduct would not, in a criminal case under criminal standards of proof, constitute a crime; or whether we are not aware of any, or conclude that there are no victims of a crime; or whether an author discusses a trial, rather than the underlying crime, we are forced to act as if the statute applied. We are either to engage in broad self-censorship, or to make constant recourse to an administrative body to request permission to undertake the basic activities of publishing — a body which, without any clear legislative standards to guide it, determines what books can, and cannot, be effectively commissioned. I cannot believe that this regime is consistent with the First Amendment guarantee of freedom of speech and of the press.

/s/
Michael Korda

SUBSCRIPTION OMITTED

CAPTION OMITTED

AFFIDAVIT OF NICHOLAS PILEGGI

1. I am a writer and journalist and the author of *Wiseguy*, published by Simon & Schuster. I make this declaration, based on my own personal knowledge, in support of Simon & Schuster's motion for summary judgment for declaratory and injunctive relief against New York Executive Law Section 632-a, the so-called Son of Sam law, which the New York State Crime Victims Board has applied to *Wiseguy*.

Writing *Wiseguy*

2. My involvement with *Wiseguy* began in 1981, when I was contacted by Michael Korda, editor-in-chief at Simon & Schuster, to discuss a project for a book involving Henry Hill, whom he described as a low-level mobster, recently a participant in the federal Witness Protection Program, and cooperating with federal prosecutors. My own research files, compiled through thirty years as a writer particularly interested in organized crime, included information on Henry Hill, and based on my own information I believed that he was in a position to provide information concerning daily life in organized crime unlike any that had yet been made public. I told Korda that I was interested in the project, but that I wanted to check with various friends in the United States Attorney's Office in Brooklyn, as well as meet with Henry Hill and his attorney, Robert Simels, before I agreed to pursue it.

3. I contacted Ed McDonald, the chief of the federal organized crime strike force in the United States Attorney's Office in the Eastern District; Thomas Puccio, his predecessor at the strikeforce; FBI agents in the Queens, New York office; and New York City detectives who specialize in organized crime. They all confirmed that Henry Hill was in fact cooperating with federal law enforcement authorities (and that he would receive immunity for any crimes he may have committed); that he was providing valuable information, and was deeply familiar with the

workings of organized crime in New York; and that he would likely be able to provide the basis for an unusual and revealing look at organized crime quite different from the romantic view presently before the public from *The Godfather* and other such works. They each agreed to cooperate with me as much as they could should I undertake a book based on Henry Hill's story.

4. I met with Henry Hill soon thereafter, at a secret location in the midwest at a meeting set up by federal authorities. I explained to him that I would need to debrief him for literally hundreds of hours over a lengthy period. Moreover, since I would be unable to contact him (in light of the requirements of the witness protection program), he would have to call me on a daily basis as long as I was writing the book. I concluded after this meeting that Hill's story would indeed be suitable for the kind of book I wanted to write; that he was intelligent, detached, and perceptive enough to be able to provide me with the amount and detail of information I would require; and that he would be willing and able to commit the time and effort that the proposed book would require.

5. There was no question about why Henry Hill was willing to participate in what would be, for him, a time-consuming process: he needed the money. His departure from organized crime had left him without income and his obligation to federal prosecutors to be available to testify in court cases precluded most jobs. Given the substantial investment of time that I required from him, he would not have agreed to assist my work without compensation. He made this plain to me in the negotiations between us about what portion of the book's proceeds would be his.

6. The practice of compensating primary sources for books is long-established and common in publishing — ' all ghost-written autobiographies are examples — and also indispensable: such books could not be written if such compensation were prohibited. The practice is *not* limited to books about criminals, and payments to primary sources are made to purchase time and effort, not to reward or exploit crimes or crime victims. For example, like *Wiseguy*, my first non-fiction book, *Blye, Private Eye*, the story of a real private detective in New York City, could not have been written without the subject spending literally hundreds of

hours with me, taking me around to his accustomed haunts, meeting his friends and family. Since hours devoted to working with me are hours spent not otherwise remuneratively employed, it was necessary to compensate that subject, just as it was necessary to compensate Hill for *Wiseguy*.

7. *Wiseguy* was written with precisely the extensive investment of Henry Hill's time that I had expected. Over a period of more than two years, we talked at length virtually every single day, with not more than an occasional Sunday or holiday skipped. We spent more than three hundred hours together; my notes of conversations with Henry occupy more than six linear file feet. The book could not have been written without this intense involvement; it would have lacked the immediacy and the bite of ugly mob reality that led, in my judgment, to its success.

8. Henry Hill had no right of review or approval, or right to edit, my manuscript of *Wiseguy*.

Section 632-a Interferes With the Creation of Certain Books

9. Although the Board's final order concerning *Wiseguy* did not find that I was a representative of Hill, or subject my royalties or advances to operation of the Son of Sam law, its prior correspondence in this matter suggested that I was indeed subject to it. At the start of its investigation, the Board directed me to suspend any payments "potentially covered" by the law, and appeared to direct Simon & Schuster to suspend payment to me as well. *See* McNamara Aff't exhibit 2 (annexed exhibits C, D). The possibility that I would be penalized, and give up income for three years of work, for having written a book that required payment to a primary source like Henry Hill, was extremely disturbing, and made me unwilling to pursue similar projects because of the risk to my income.

10. Section 632-a has further severely interfered with my freedom to write and publish because of its prohibition on the payment of primary sources. I have had to reject three separate projects which I would have undertaken or pursued with a view to undertaking them, because Section

632-a has effectively prohibited me from embarking on any projects which involve primary sources arguably subject to the Act.

11. One such project involves an ex-New York City Police detective, who was bounced out of the police department for corruption and ended up working in organized crime for the man who corrupted him. After serving some time in prison, he is now out, and filled with remorse. He would like me to help him tell his story: to name names, to write about what happened to him, and how easy it is for the mob to corrupt certain police officers. But I cannot promise this man that he will be paid for this book on a timely basis; and, in his present economic situation, he will not devote the hundreds of hours with me that this book would require, unless he can be paid on an ongoing basis, which the Son of Sam law purports to forbid.

12. Another project I have been compelled to forgo is the story of another former policeman. After being arrested for armed robbery and then serving time as an inmate in a state prison, he began working as an undercover agent and has broken eight homicides for prosecutors. Again, this kind of project is effectively blocked from the outset. Neither I nor a publisher nor a literary agent can promise him any on-going compensation. If he cannot be certain of being paid, he will not provide the investment of time necessary for the book.

/s/
Nicholas Pileggi

SUBSCRIPTION OMITTED

CAPTION OMITTED

AFFIDAVIT OF STERLING LORD

Sterling Lord, being duly sworn, deposes and says:

1. I am a literary agent, and president of Sterling Lord Literistic, a literary agency in New York (previously known as the Sterling Lord Agency). Since 1953, I have represented hundreds of authors in negotiating agreements for many hundreds of books, films, and plays. Among the authors I have represented are Pierre Salinger, Edward M. Kennedy, Nicholas Pileggi, David Wise, and Art Buchwald. Among the books for which I have negotiated publishing agreements are Joe McGinnis' *Fatal Vision*, Jimmy Breslin's *The Gang That Couldn't Shoot Straight*, Bill Vieck's *Vieck as in Wreck*, and Doris Kearns Goodwin's *The Fitzgeralds and the Kennedys*. I have also been Treasurer of the Society of Authors' Representatives for thirteen years.

2. I represent Nicholas Pileggi and Henry Hill in connection with Pileggi's non-fiction work *Wiseguy*. I make this affidavit in support of Simon & Schuster's motion seeking summary judgment for declaratory and injunctive relief against New York Executive Law Section 632-a, the so-called Son of Sam law.

The Creation of *Wiseguy*

3. I negotiated an agreement in August 1981 ("the August Agreement") between Pileggi, Hill, and the Sterling Lord Agency as agent for them both, concerning the creation of a book-length manuscript by Pileggi that would use Hill's story as the basis for a study of the inner working of organized crime. (A copy of that agreement was annexed as Exhibit A to the New York State Crime Victim Board's May 27, 1987 Proposed Determination and Order. The Proposed Determination and Order and its annexed exhibits are attached below as Exhibit 2.) The August Agreement provided for dividing any author's payments (encompassing both advances and royalties) between Pileggi and Hill

according to a specified split, after deduction of standard literary agent's fees (generally of 10%). It also provided, as is customary, that publishers and other licensees and grantees of rights in the book would pay all monies in the first instance to the Sterling Lord Agency. The percentage of proceeds to be paid to Hill for his time, effort, and exclusive cooperation was well within the range that other non-author subjects (primary sources) have received in similar agreements in my experience. Based on the vigorous negotiating positions taken by Hill's attorney, Robert Simels, on Hill's behalf, there was no question but that Hill viewed the compensation that he would earn, including an advance as soon as a publishing agreement with a publisher was secured, as the primary inducement to his cooperation with Pileggi.

4. An agreement ("the Publishing Agreement") between Pileggi and Hill and Simon & Schuster for a book about organized crime was signed on or about September 1, 1981. (A copy of that agreement is annexed as Exhibit A to Exhibit 2, below.)

The Impact of Section 632-a

5. The Crime Victims Board wrote Simon & Schuster in January 1986, asking it to suspend all payments due under contracts for *Wiseguy*. (*See* annexed exhibit C to exhibit 2, below.) Since that time, pursuant to the Board's direction, Simon & Schuster has withheld all payments due the Sterling Lord Agency on behalf of Hill under the Publishing Agreement.

6. Under standard industry practice, a publisher ordinarily agrees to pay any sums due the authors to the agent, and the literary agent's sole compensation is the percentage fee (usually 10%) that the agent-author agreement permits the agent to deduct from the authors' payments.

7. The agreements concerning *Wiseguy* conformed to this standard pattern. Accordingly, as a consequence of Simon & Schuster's inability to pay Hill pursuant to the Board's direction on January 1986, reaffirmed in its June 1987 Order, the Sterling Lord Agency has not been properly compensated for its substantial work in connection with *Wiseguy*. The portion of our fee to be derived from payments due Henry Hill on or after

January 1986 has been held in escrow by Simon & Schuster, together with the payments due Hill himself.

8. As this experience demonstrates, Section 632-a precludes my agency and other agents generally from being paid for work for books which may be subject to its terms. The law, moreover, is not limited to payments on behalf of formally accused or convicted persons; the Board directed Simon & Schuster to suspend *all* "payments on *any* contracts which *may* be *potentially* covered" by the law as soon as a publisher learns of an agreement that it believes may be subject to the law. *See* annexed exhibit C to exhibit 2, below (emphasis added). And this direction to publishers to cease such payments was issued before any due process was accorded — that is, without waiting for the issuance of final administrative orders after hearings and full review of the relevant agreements and of books or manuscripts that may be covered.

9. Because Section 632-a prohibits publishers from paying literary agents for work in connection with works potentially within its reach, as a practical matter it forecloses our involvement in any project to which it may apply. My agency would not agree to undertake any project that would arguably fall within its terms and for which we could not be paid pursuant to our standard agreements. It makes no economic sense for us to devote substantial resources (time, legal fees, and other out-of-pocket expenses) to projects for which we may not achieve normal recompense. Based on my familiarity with other literary agents and the publishing industry generally, I believe that Section 632-a would deter other literary agents as well from representing authors for works that might be subject to its terms.

10. Literary agents like myself frequently spawn discussions leading to agreements to publish works that would not otherwise be created. By making a literary agent's qualification for compensation for the time, effort, and expense involved in certain projects doubtful, contingent on the Board's reaction to any work, the existence of any potential victims, and the expenditure of legal expenses and additional time to deal with the Board, Section 632-a introduces a fatally unacceptable level of complexity in such projects. Section 632-a will therefore deter and effectively abort

the creation and publication of some non-fiction works that would otherwise be created and published were Section 632-a not in effect.

11. New York is the primary location for literary agents and publishers. Section 632-a thus has an extremely significant effect in impeding and preventing non-fiction books from publication and distribution throughout the United States and abroad.

12. One of the first manuscripts that I sold to a publisher was a frank autobiographical book about a life of burglary, *Next Time Is For Life*, written by Paul Warren (a pseudonym) and published in 1953. The very first sentence of this unusual and valuable book — "The first thing I remember stealing was a dollar bill I picked up from the floor of a Chicago grocery when I was thirteen" — makes plain that *Next Time Is For Life* would not have been published had the Son-of-Sam law been in effect at that time and place. Even if the author would nonetheless have been willing to spend the time writing it, neither I nor other literary agents would have been willing to undertake the effort to try to interest a publisher in an unusual book by an unknown writer if our fee were in doubt.

13. I am aware of the Board's October 26, 1987 final order concerning Jean Harris' book *Stranger in Two Worlds* in which the Board granted the request of The Lantz Office, Ms. Harris' literary agent, to retain its commission. For at least two reasons, this order does not remove the severe deterrent that Section 632-a poses to the participation of literary agents in projects potentially subject to Section 632-a. First, the Board twice noted that Dr. Herman Tarnover's family, the only potential claimant under the law, had expressly agreed to the grant of administrative relief to the literary agent. This unique factor renders the Board's exercise of discretionary relief to The Lantz Office pursuant to Section 632-a (8) of little if any future benefit to literary agents.

14. In addition, as an agent, I have a fiduciary obligation to my clients to inform them of the impact Section 632-a will have on their compensation. Based on my more than three decades in business, I have no doubt that clients, when informed that they will not be paid for a book

or other project for at least five years, will for that reason simply decline to proceed with proposed projects potentially covered by Section 632-a. Whether or not this office or literary agents generally might may eventually be compensated for work undertaken after uncertain delays and the expenditure of substantial legal expenses is a moot question, when the books potentially subject to the law will not be written in the first place.

15. Writers do not write books, and subjects of books whose cooperation is essential do not provide substantial assistance to authors, without enforceable promises of payment, including payment of advances, which are standard payments made before a book is written. Literary agents do not play their role in putting together book deals without enforceable promises of payment for significant services rendered. Advances are a central part of the compensation arrangements generally used in the publishing industry, because people working on books need something to live on while writing. Without the payment of advances, many books now being written would not be written at all, or certainly not with the time-consuming care that a good book requires. By effectively precluding payments to authors, subjects, and literary agents for an indeterminate period of time of at least five years, the Son of Sam law necessarily inhibits, deters, and stifles the publication of books potentially within its reach.

/s/

Sterling Lord

SUBSCRIPTION OMITTED

CAPTION OMITTED

AFFIDAVIT OF GERALD E. HOLLINGSWORTH

GERALD E. HOLLINGSWORTH, being duly sworn, deposes and says:

1. I am Vice President and General Counsel of Random House, Inc. I have held these positions for the past fifteen years. I submit this affidavit, based on personal knowledge, in support of Simon & Schuster's motion for summary judgment and an order declaring New York Executive Law Section 632-a, the so-called Son of Sam law, unconstitutional under the First Amendment.

2. Random House is a major trade and mass market publisher, based in New York City. Among its well-known publishing imprints are Random House, Knopf, Pantheon, Vintage, Ballantine, and Fawcett. Random House is in the business of regularly publishing books within the class of those potentially reached by Section 632-a. Among books Random House has published in the past that would have been potentially subject to Section 632-a or similar statutes in other jurisdictions, had they been in effect, are *Witness* by Whitaker Chambers, *The Autobiography of Malcolm X*, and *The Essential Lenny Bruce*.

The adverse impact of Section 632-a on book publishing

3. As General Counsel of Random House, I am called upon to give legal advice concerning the application of various laws to our publishing activities. Among these laws is Section 632-a. For the reasons cogently presented in Paragraph 17 of Michael Korda's affidavit, which I adopt as my own, I am compelled to give Section 632-a the broadest conceivable interpretation in rendering advice to my client.

4. Based on my experience in the publishing industry, I also agree with, and hereby incorporate, Michael Korda's observations and conclusions in Paragraphs 9-16 concerning the inhibiting and deterring

effect Section 632-a will have on the writing and publishing of books. Because writers do not write books without secure promises of timely payments, including advances, and literary agents will not represent writers for projects for which they will not be properly paid, and publishers (such as Random House) are loath to incur the risk of substantial monetary penalties, fewer books potentially subject to Section 632-a will be written and published than if it were not the law. Moreover, some books that might have been potentially subject to it will be edited to avoid its application, thereby depriving the reading public of material to which they would otherwise have had access.

5. Had Section 632-a or similar statutes been in effect at the time publishing agreements were being discussed for the books listed above by Whitaker Chambers, Malcolm X, and Lenny Bruce, in my judgment Random House would not have been able to publish those books at the times and in the manner published. Contracts would have been required to be submitted to the Board; advances and royalties could not have been promised or made; authors might well have determined not to write the books at all, or to write them to avoid application of Section 632-a, or to publish them in other states, through publishers unlikely to achieve the sales of a major publisher like Random House, to avoid the application of Section 632-a.

Section 632-a is underinclusive

6. Although the Board has not yet determined that any book published by Random House is subject to Section 632-a, our experience with Jack Henry Abbott's book *In the Belly of the Beast* instructively shows the statute's underinclusiveness.

7. Random House published *In the Belly of the Beast* prior to Jack Abbott's murder of Richard Adan. Accordingly, under its clear terms, the statute did not apply to the payments for the book and could not assist Mr. Adan's estate and heirs. (Nor has the Board ever suggested that the book was subject to the law for any other reason.) Thus, this tragic event demonstrates how the content-based application provided for in the statute results in an underinclusive statute whose means are not closely fit to

advance its ends. Notwithstanding the evident merit to a recovery by Mr. Adan's estate, the Son of Sam law is not drafted to achieve it.

8. It is also noteworthy that the other non-content based and non-press targeted remedies provided for in New York law permitted the estate to receive Mr. Abbott's payments from Random House. The estate filed an ordinary tort suit and, using the prejudgment remedies already provided in the Civil Practice Law and Rules, was able to attach royalty payments due from Random House to Mr. Abbott. At the successful conclusion of the lawsuit, armed with a judgment, the estate was able to execute on the attached assets.

9. Finally, I want to stress another important point that the Abbott-Adan case illuminates: the limited, carefully defined objection that Random House and publishers generally have to the Son of Sam law. We do not contend that crime victims who obtain tort judgments are prohibited by the First Amendment from obtaining satisfaction from the proceeds of expressive activity. To the contrary, we see no basis for contending that those assets should be treated differently from any other assets that can be used to satisfy legal judgments under otherwise fair and constitutional legislation. The defects in Section 632-a are that it applies only on the basis of impermissible content-based and speaker-based distinctions, that it targets earnings from expressive activity for special adverse treatment, and that as a result of its design it places substantial and unjustified burdens on expressive activity.

/s/
Gerald E. Hollingsworth

SUBSCRIPTION OMITTED

CAPTION OMITTED

AFFIDAVIT OF JAN F. CONSTANTINE

JAN F. CONSTANTINE, an attorney duly admitted to practice under the laws of the State of New York, being duly sworn, deposes and says:

1. I am Associate General Counsel of Macmillan, Inc. ("Macmillan"). Macmillan, a prominent book publisher since 1869, is one of the largest publishers of textbooks and children's books in the United States. Through its various divisions — Macmillan Publishing Company, The Free Press, Collier Books, Charles Scribner and Sons, Atheneum, Rawson Associates, G.K. Hall, Michie, Bennett & McKnight and Glencoe — Macmillan publishes books on a variety of topics for the general public as well as schools (elementary, college and graduate) and professions. I make this declaration in support of Simon & Schuster, Inc's. ("Simon & Schuster") motion for summary judgment in the above-captioned action.

2. Since February, 1986, I have been representing Macmillan in a proceeding before the New York State Crime Victims Board ("the Board") regarding Macmillan's publication of a book by Jean Harris entitled *Stranger in Two Worlds*. Based on my own dealings with the Board in this matter, and my dealings with the Statute in a range of other matters, I concur with Simon & Schuster's position as to the unconstitutionality of N.Y. Executive Law Section 632-a (hereinafter sometimes referred to as "the Statute") as set forth in its complaint and papers submitted in support of the instant motion. In particular, I agree with the points made by Simon & Schuster's editor-in-chief Michael Korda in paragraphs 9-17 of his declaration concerning the ways in which Section 632-a detrimentally interferes with the unfettered publication of works protected by the First Amendment and will result in fewer books being written and published, and changes in books that *are* published.

3. In my role as an attorney for Macmillan, I have had first-hand experience with the way in which Section 632-a interferes with freedom of speech and of the press. I have been, and will be in the future, called on

to make judgments concerning whether a given proposed contract (and the book it represents) is within or without the Statute. But the Statute is so broadly and yet vaguely written, and the effective penalties for its violation so severe, that there is no way to advise my client except to err in every case on the side of the Statute's applicability. Thus, *either* we will have to provide contracts and manuscripts for review by government officials, who will then make content-based determinations as to the Statute's coverage, *or* we will have to forego a given project, or alter it so that the book contracted for will not be covered. Of course, it is unprecedented for a law to effectively require publishers to submit contracts and manuscripts to government officials for their review.

4. My experience with respect to the Harris book *Stranger in Two Worlds* is illustrative of the overbroad reach of the Statute, the way it can pressure publishers to insist on alterations in book content, the impossibility of a publisher's determining for itself whether a book is covered without lengthy legal wrangling with the Board, and the delays and uncertainties the Statute poses to promising and providing payments to writers.

5. In January 1985, Robert Stewart, an editor with Macmillan, was approached by The Lantz Office ("Lantz") as author's agent with a proposal for a book to be written by Jean Harris about prison reform. Ms. Harris, who in 1981 had been convicted of second degree murder in the killing of Herman Tarnower originator of the Scarsdale Diet, is presently serving a term of fifteen (15) years to life at Bedford Hill Correctional Facility. On March 19, 1985, Macmillan and Jean Harris entered into a publishing agreement. At that time, the book consisted only of a loosely organized outline and some 100 sample pages about prison reform. Initially, the project as envisioned by Macmillan and Ms. Harris was not going to discuss the crime or her trial and the original outline made no mention of these topics. In accordance with the agreement, Macmillan paid Lantz, Ms. Harris' agent, $50,000 upon execution of the Agreement; another $50,000 advance was to be paid upon acceptance of a final manuscript.

6. In late 1985, as the manuscript evolved into its final form, a question was first raised at Macmillan as to whether the Board might determine that contents of the book fell within New York Executive Law 632-a, even though the principal subject of the book remained prison life. After consulting with Lantz and Ms. Harris, Macmillan felt that it had no choice except to submit a copy of the Agreement and the manuscript to the Board in accordance with the Statute and advise the Board that no further monies would be paid to Ms. Harris until a final determination was made as to the Statute's applicability. It did so by letter of February 11, 1986.

7. The book, *Stranger in two Worlds*, was published in May 1986. As finally written and published, the book contained two chapters that did mention Ms. Harris' crime and her trial. These chapters quote extensively from the court transcripts of the trial and constitute only a small portion of the book (*i.e.* less than 20%). The largest section of the book describes Ms. Harris' life in prison. The book received favorable reviews, made the New York Times bestseller list, and Ms. Harris was commended by the reviewers for both her writing ability and her insight into the workings of the prison system.

8. On July 28, 1986, the Board issued a Proposed Determination and Order finding, *inter alia*, that two chapters of the book (containing, for the most part, verbatim trial testimony) fell within the Statute and that Macmillan should not have paid over to Jean Harris the $50,000 advance on signing prior to a ruling from the Board (even though the parties did not contract for a book that appeared to be within the Statute.) The Board ordered that in the event that Ms. Harris did not pay over to the Board the $45,000 advance previously received ($50,000 minus the Lantz commission), Macmillan would be obligated to do so. The Board also ordered Macmillan to submit to the Board "any future or present contract between it and any other person or entity concerning Jean Harris or the work *Stranger in Two Worlds*".

9. Believing that the Board had misconstrued the Statute and exceeded its statutory mandate, Macmillan and the other interested parties, including Lantz and The Children of Bedford, Inc., Ms. Harris' assignee

of all moneys earned under the agreement, requested a hearing. Hearings were held before a member of the Board on October 2, 1986; November 14, 1986; February 10, 1987 and June 3, 1987.

10. Thereafter, on October 26, 1987, the Board upheld the proposed order and determination and issued its Final Determination and Order requiring all moneys earned under the agreement to be paid over to the Board in accordance with the Statute. The Board rejected Macmillan's contention that the failure to submit the agreement and the payment of the initial advance should not be considered violative of the Statute since, at the time payment was made, the book as conceived was not within the Statute. The Board affirmed the relief against Macmillan as detailed above in paragraph 8 above. The Board also held that it had no jurisdiction to consider the parties' constitutional challenge. Macmillan presently intends to appeal the final determination in New York State Court.

11. Section 632-a has had and continues to have a substantial inhibiting effect on Macmillan's conduct of its publishing business and First Amendment rights. The statute, as it now stands, precludes Macmillan from entering into any publishing agreements with persons who could arguably be subject to its broad scope for books whose subject may involve discussion of their crimes, since it hinders the publisher's ability to compensate such authors who have a story to tell. Authors who cannot be assured of being compensated will not enter into publishing agreements.

12. Moreover, as the Jean Harris situation illustrates, the Board apparently goes even further, by mandating the submission of a publishing agreement *about* an "accused" or "convicted" criminal under the Statute, regardless of the author. Thus, the Board has directed submission of any contracts "concerning Jean Harris", written by Ms. Harris or anyone else on any subject matter whatsoever, whether or not the book contains Ms. Harris' own reenactment of the crime for which she was convicted or an expression of Ms. Harris' thoughts, feelings, opinions or emotions about the crime. *See* paragraph 8 *supra*.

13. Based on Macmillan's experience in the Jean Harris case and other matters, and the vagueness of the statutory language, in advising

Macmillan as to the legal consequences of entering into publishing agreements with authors for works dealing with the subject of crime, I would have to oppose such a project and recommend rejection of the agreement if the work even remotely could be considered to fall within the Statute. As a result, the statute will necessarily result in some books not being published. Of course, such authors will be willing to spend the time and effort to undertake to write potentially covered books without a secure promise of being compensated in less than five years in the first instance, the Statute necessarily will result in some books not even being written.

14. In sum, for the reasons set forth here and in the affidavit of Michael Korda, Section 632-a directly and substantially burdens the right of publishers to take necessary steps to publish books that, in their editorial judgment unfettered by the operation of Section 632-a, they would choose to publish. Accordingly, I respectfully urge this Court to issue a judgment declaring that the Statute violates the First Amendment of the Constitution and enjoining its enforcement by the Board.

/s/

/s/

Jan Constantine

SUBSCRIPTION OMITTED

CAPTION OMITTED

DECLARATION OF JASON McMANUS

Jason McManus, under penalty of perjury declares:

1. I am Editor-in-Chief of Time Incorporated, publisher of TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, and LIFE Magazines. I make this declaration in support of Simon & Schuster's motion for a declaration that Section 632-a of the New York Executive Law, the so-called Son of Sam law, abridges the freedom of speech and of the press guaranteed in the First Amendment.

2. Section 632-a presents serious concerns to publishers to the extent that it would prevent a publisher from paying a fee to the author of an article which relates the author's thoughts, feelings, opinions or emotions relating to the author's commission of a crime, even if the crime was never prosecuted. It is also a serious concern that the statute would apply to accounts of crimes in which the public has great interest committed by persons of political or social significance such as, for example, individuals involved in acts of civil disobedience, civil rights protests or matters of such political significance as the Watergate or Iran-contra scandals. A statute which significantly interferes with the discretion of editors in contracting with any individuals for written accounts of their experiences has the ultimate effect of reducing the public's access to newsworthy material. It is contrary to the First Amendment goal of permitting widespread debate about matters of public importance.

3. Although I am advised that §632-a has most frequently been invoked against book publishers, such as Simon & Schuster, its scope clearly involves magazine publishers just as substantially. While our regular reporting of alleged criminal activity of course involves no contracts with or payments to alleged criminals, there could arise situations where a full account of the criminal activity or, often more significant, the perspective of the alleged criminal concerning his motivation or the background of his activity can only be obtained by dealing with the

individual most directly involved. However much one may disapprove of their actions, it is in society's interest that the views, for example, of John Dean or John Ehrlichman on the Watergate scandal; of Ivan Boesky or Martin Siegel on insider trading; of Oliver North or John Poindexter (if accused) on the Iran-Contra affair; of Stanley Friedman on political corruption; and even of Bernhard Goetz on the criminal justice system be made available to the public, should these persons be willing to discuss these matters. Any law that prohibits them from being compensated for their efforts to communicate information or their ideas, or that obstructs publishers, of magazines or books, from encouraging them to make available as much information as possible, is ultimately harmful to our society and is the kind of constraint I would have thought would not be permitted by the First Amendment to the Constitution.

4. I have also been advised that §632-a includes in its sweep not merely convicted criminals, but any person who has "admitted the commission of a crime for which such person is not prosecuted." This would have the unfortunate effect of turning our editors into lawyers, if not judges, in order to determine whether a person who wrote about his civil rights protest or his international arms dealing, for example, was admitting the commission of a crime. This application would have the effect of causing our editors to steer away from publishing discussions of controversial areas, or withhold payment due such a writer, or face the risk of being found to have violated this law themselves. None of these alternatives should be acceptable. This application of the law would promote a self-censorship that is contrary to the best interests of our society and is, again, something I would have believed to be contrary to the First Amendment.

5. It is my opinion, therefore, that §632-a of the Executive Law interferes with the freedom of our magazine editors to publish and to make editorial decisions concerning information they will present to the public, to the ultimate harm of our free society and contrary to the principles of the First Amendment.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 11, 1987.

/s/
Jason McManus

CAPTION OMITTED

AFFIDAVIT OF PHYLLIS E. GRANN

Phyllis E. Grann, under penalty of perjury, declares:

1. I am Chief Executive Officer of The Putnam Publishing Group, Inc. and President of G.P. Putnam's Sons ("Putnam"). For nearly 150 years Putnam has published a broad range of general interest books, including biographies, autobiographies and social commentaries by authors as diverse as Washington Irving, Theodore Roosevelt, Abbie Hoffman and Armand Hammer. I make this affidavit in support of Simon & Schuster's motion seeking summary judgment for declaratory and injunctive relief against New York Executive Law Section 632-a, the Son-of-Sam law.

2. The New York Son-of-Sam law operates as a prior restraint by inhibiting or preventing the publication of books solely on the basis of content. Because of the breadth of the statute and the administrative and financial burdens imposed by it, publishers are forced to censor a whole category of books — those in which we contract directly with a "person convicted of a crime" (or his agent or representatives) and which depict or enact crimes. We are forced to decide what can be said, who can say it and how it can be said, often at a moment in the publication process that is premature, that is when the book is first presented for consideration and before it is fully written.

3. I believe that certain books will *never* be written because of the statute; someone who is "convicted of a crime" within the meaning of the statute is unlikely to spend the time and effort to write a book if he does not get paid. And, even if the book is written or a publication outline prepared, such books may never be published because of the statute.

4. At this point in time, Putnam would probably not enter into a publishing agreement that it knows is subject to the statute. For example, Putnam would not enter into a publishing agreement with Bernard Goetz, Robert Chambers (the "preppy" murder), Hedda Nussbaum (murder/abuse)

or Cheryl Pierson (incest/murder), even though their stories deal with topics of legitimate and overwhelming public interest. The public has a right to know — and a need to know — the circumstances and thoughts behind the headlines. And, although it may be distasteful and unseemly for "criminals" to receive money for their stories, the fact remains that their stories may never be fully known or understood if they are not paid. One may not like the fact that Jeffrey MacDonald was entitled to receive income from the sale of Joe McGinniss' book FATAL VISION, which was published by Putnam. But there is certainly no doubt that the book contains valuable insights into crime and its motivation which would have been unavailable without Joe McGinniss' promise to pay royalties to MacDonald.

5. Had the Son-of-Sam law been in existence years ago, several notable titles published by Putnam might never have seen the light of day. Abbie Hoffman's autobiography, SOON TO BE A MAJOR MOTION PICTURE, and his account of life on the lam, SQUARE DANCING IN THE ICE AGE, might never have been published. A similar fate might have met Robert Garwood's account of his years as a prisoner of war, CONVERSATIONS WITH THE ENEMY, as well as Ira Pecznick's account of his life in the Mafia, TO DROP A DIME, which was co-written with the noted journalist Paul Hoffman.

6. The ambiguities in the statute create additional problems. They force us to restrict what we publish in ways that may be completely unintended. It is difficult if not impossible to know precisely which crimes are covered. Who is a person convicted of a crime? Who are his agents? His representatives? What if the book is not about the crime but is about a different topic? What if the book mentions the crime in passing? In doubtful cases we may be forced to pass over perfectly acceptable books because of our concerns about the Son-of-Sam law. For example, if the New York statute applied, would it mean that Armand Hammer would have to forfeit his proceeds from WITNESS TO HISTORY because he discusses his Watergate conviction? Would it mean that Abbie Hoffman could not be paid for his autobiography or that a person who has received full immunity from prosecution would be required to forfeit his income

from publishing when he is not prevented from making a living in any other way?

7. Quite apart from the substantive law, the administrative and financial burdens imposed by the statute operate as a tremendous disincentive to publish certain types of books. Those burdens are so severe that in doubtful cases we are forced to err on the side of caution and to reject a manuscript or edit out questionable passages. All things being equal, if we had to choose between two books, we would choose the one without the headaches associated with the Son-of-Sam law. At least one of the factors in our decision not to accept MAYFLOWER MADAM for publication was the inconvenience, difficulty and expense of dealing with the New York State Crime Victims Board. Our caution in the editorial process is illustrated by a recent book by a celebrity who had been convicted of a crime. We felt compelled to severely restrict any discussion of the crime in order to avoid the snare of another state's Son-of-Sam law. Full treatment of the crime would have added credibility to the main subject of the book and increased significantly the book's general interest. However, we and the author did not wish to run the risk of being caught up in the bureaucratic maze of the Son-of-Sam procedures.

8. For the reasons stated above, I do not believe that the New York Son-of-Sam law is consistent with the First Amendment.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of December, 1987.

/s/

Phyllis E. Grann

EXHIBIT 1

A COPY OF *WISEGUY*, WRITTEN BY NICHOLAS PILEGGI, PUBLISHED BY SIMON & SCHUSTER IN 1986, HAS BEEN LODGED WITH THE CLERK OF THE COURT

Before the

STATE OF NEW YORK CRIME VICTIMS BOARD

In the Matter of a Contract

Between

HENRY HILL and **NICHOLAS PILEGGI**

and

SIMON & SCHUSTER

NOTICE OF PROPOSED DETERMINATION AND ORDER

PLEASE TAKE NOTICE that the Crime Victims Board, State of New York has issued pursuant to Executive Law 632-a and 9 NYCRR 526.1, the Proposed Determination and Order affixed hereto in the above-captioned matter.

This Proposed Determination and Order will become final within thirty (30) days of the date of service of this notice unless a hearing is requested in writing by an interested party. If you disagree with the Proposed Determination and/or Order, you have the right to a hearing before the Crime Victims Board prior to a final determination in this matter. A request for a hearing must be made in writing addressed to: Chairman, New York State Crime Victims Board, 97 Central Avenue, Albany, New York 12206. The request should state the reason for your disagreement with the Proposed Determination and/or Order, and your interest in the matter.

Dated: May 27th, 1987
Albany, New York

Yours very truly,

/s/

Lorraine Felegy, Counsel
New York State
Crime Victims Board

Before the

STATE OF NEW YORK CRIME VICTIMS BOARD

In the Matter of a Contract

Between

HENRY HILL and **NICHOLAS PILEGGI**

and

SIMON & SCHUSTER

PROPOSED DETERMINATION AND ORDER

Findings of Fact

1. On or about April 27, 1980 Henry Hill was arrested in Nassau County and was charged in six indictments numbered 50764-50769 with Conspiracy to Sell Drugs.

2. In May 1980, Henry Hill entered into the federal witness protection program in exchange for his agreement that he would cooperate with various law enforcement agencies.

3. In the interest of justice the six indictments against Henry Hill were dismissed.

4. Simon & Schuster is a for-profit corporation doing business in New York State with offices located in New York City and is in the business of publishing books.

5. The Sterling Lord Agency is a literary agency with offices at 660 Madison Avenue in New York City.

6. On September 1, 1981 Simon & Schuster and Henry Hill and Nicholas Pileggi entered into a Contract known as a Publishing Agreement (hereinafter the "Contract"), a copy of which is annexed hereto as Exhibit "A".

7. Under the terms of the Contract, Henry Hill and Nicholas Pileggi (jointly referred to as "Author" in the Contract), sold exclusive publishing rights to a work entitled *Wiseguy*, to be authored by Henry Hill and Vincent Pileggi, to Simon & Schuster.

8. The Contract further provides for the payment of monies by Simon & Schuster to Author, to be divided between Henry Hill and Nicholas Pileggi, pursuant to a separate agreement.

9. On August 21, 1981 Henry Hill and Nicholas Pileggi entered into an agreement (hereinafter "Agreement") whereby all monies received in the sale of a book length manuscript concerning Hill's life, to be prepared cooperatively by Hill and Pileggi were to be divided between Henry Hill and Nicholas Pileggi according to specified percentages for printed page and performance rights. The Agreement further provided that the Sterling Lord Agency was to receive and retain ten percent (10%) of any and all monies payable to Henry Hill and Nicholas Pileggi in respect to said work. The Agreement is hereto annexed as Exhibit "B".

10. The work *Wiseguy* was published in 1985.

11. The work *Wiseguy* is Henry Hill's life story from 1955 when he first became involved with organized crime until May 1985 when he joined the Federal Witness Protection Program. It is a veritable catalog of crimes in which Henry Hill admits to the commission of various crimes and expresses his feelings, opinions or emotions regarding such crimes.

12. The Crime Victims Board first became aware of the possibility of a Contract between Henry Hill and Simon & Schuster in January, 1986.

13. On January 31, 1986 the Crime Victims Board by its Counsel sent certified letters to Simon & Schuster and Nicholas Pileggi requesting that a copy of the Contract and certain other information be turned over to the Crime Victims Board pursuant to Executive Law § 632-a (hereby annexed as Exhibits "C" and "D").

14. On May 27, 1986 the Crime Victims Board received a letter from Simon & Schuster, signed by John C. Bender, Group Vice President and General Counsel, (annexed hereto as Exhibit "E", which enclosed a copy of the Contract (see Exhibit "A"), a copy of the Agreement between Henry Hill and Nicholas Pileggi (see Exhibit "B") and copies of two letter amendments to the Contract annexed hereto as Exhibits "F" and "G".

15. Based on the correspondence received on May 27, 1986 from Simon & Schuster (See Exhibit "E"), payments in the amount of $96,250.00 were made to the Sterling Lord Agency for the account of Henry Hill.

16. At present Simon & Schuster is holding approximately $27,958.00 due to be paid to Henry Hill pursuant to the Agreement.

OPINION AND ORDER

1. The Contract between Henry Hill and Nicholas Pileggi and Simon & Schuster, dated September 1, 1981 is of the type regulated by Executive Law §632-a. As such a copy of such Contract should have been turned over to the Crime Victims Board in 1981 at the time of execution for the Board's determination as to whether it came within the ambit of the Statute. At the very least, a copy of the Contract should have been turned over to the Board prior to October 10, 1984 the date of the first payment by Simon & Schuster to Sterling Lord Agency for the account of Henry Hill. The statute and rules of the Crime Victims Board provide ample means by which a publisher may obtain a determination from the Board regarding the applicability of Executive Law §632-a to a particular Contract. These procedures include a request for an Adjudicatory Ruling (9NYCRR §525.19) by which a publisher may obtain a binding ruling based upon an actual or hypothetical set of facts, a request for an advisory opinion of Counsel based upon a stipulated set of facts or circumstances, or a request for a formal Proposed Determination and Order based on submission of an actual Contract and related information (9NYCRR §526.1). By failing to turn over a copy of the Contract to the Board and

by paying $96,250 to Henry Hill without seeking any determination from the Board, Simon & Schuster violated Executive Law §632-a.

2. The Board has reviewed the book entitled *Wiseguy*, authored by Henry Hill and Nicholas Pileggi pursuant to the Contract and published by Simon & Schuster, in 1985, and is of the opinion that it contains thoughts, feelings, opinions and emotions regarding crimes committed by Henry Hill as well as his admission to involvement in such crimes.

3. Nicholas Pileggi is a co-author and is not a representative of Henry Hill within the meaning of Executive Law §632-a(1) and as such no monies due or owing him are subject to the mandates of Executive Law §632-a.

4. As the Board is of the opinion that the Contract as performed is of the type described in and governed by Executive Law §632-a, all monies paid to Henry Hill or his representatives under the Contract must be turned over to the Crime Victims Board to be held in escrow for the victims of crimes committed by Henry Hill.

5. The Sterling Lord Agency as an agent of Henry Hill is deemed a representative under Executive Law Sections 621(6) and 632-a, and must also turn over any monies received or to be received under the Contract on account of Henry Hill, to the Crime Victims Board. However, the Sterling Lord Agency may, pursuant to Executive Law §632-a(8) make application to the Board for payment of necessary expenses for the production of monies paid into the escrow account to be established by the Board in this case.

Accordingly, pursuant to Executive Law §632-a it is hereby

ORDERED that Henry Hill pay over to the Crime Victims Board all monies received under the aforementioned Contract, including but not limited to the payments already received under the Contract from the Sterling Lord Agency in the amount of $96,250 (less any agent fees paid to the Sterling Lord Agency under the Agreement between Henry Hill and Nicholas Pileggi), plus any interest which has accrued on such monies

from the date of receipt, along with any and all future monies due him under the Contract, such monies to be deposited in an escrow account for the benefit of and payable to any victims or the legal representative of any victim of the crimes which he admits to committing;

ORDERED that in the event Henry Hill fails to turn over to the Board monies paid to him in the amount of $96,250.00 (minus agent fees paid to Sterling Lord Agency) plus interest within thirty (30) days after issuance of a Final Determination and Order of the Board in this matter, that Simon & Schuster, shall turn over to the Board the total of monies it wrongfully distributed to Henry Hill through the Sterling Lord Agency, in the amount of at least $96,250 (minus agent fees paid to Sterling Lord Agency) plus interest from the date of payment;

ORDERED that Simon & Schuster turn over to the Board forthwith any and all monies payable to Henry Hill now held by Simon & Schuster, including the $27,958 presently held, as well as any and all future royalties or other monies that would otherwise be payable to Henry Hill or his representatives under the Contract.

ORDERED that the Sterling Lord Agency pay over to the Board any monies received from Simon & Schuster under the Contract as agent and representative of Henry Hill, as well as any other past or future monies received or to be received from the Contract on account of Henry Hill.

ORDERED that Simon & Schuster, and the Sterling Lord Agency submit to the Board a semi-annual and cumulative accounting in a form approved by the Board setting forth a statement of any and all monies paid or payable to Henry Hill, or his representatives or assigns, derived from the work *Wiseguy*, the first semi-annual report being due within thirty (30) days after issuance of the Final Determination and Order of the Board.

Dated: May 21, 1987
New York, New York

NEW YORK STATE
CRIME VICTIMS BOARD

by:

/s/
Ronald A. Zweibel
Chairman

/s/
Gennaro Fischetti
Board Member

/s/
George L. Grobe, Jr.
Board Member

/s/
Diane McGrath
Board Member

/s/
Angelo Petromelis
Board Member

Publishing Agreement
SIMON & SCHUSTER

(hereinafter called the "Publisher")

and

Henry Hill

and

Nicholas Pileggi

(hereinafter called the "Author")

whose agent is Sterling Lord Agency, Inc., 660 Madison Avenue, New York, NY 10021

agree:

FIRST: The Author

A. shall deliver to the Publisher two copies of the literary work of approximately 100,000 — 125,000 words in length now entitled *Untitled Autobiographical Non-Fiction about the Mafia* (hereinafter called the "Literary Work") in Final Form within 12 months from signing hereof;

B. makes the warranties and representations set forth in Part Two (36-45) of the Basic Agreement, except as otherwise specifically stated in THIRD (C) of this Publishing Agreement;

C. grants and assigns to the Publisher:
(i) the trade edition rights;
(ii) all other primary rights; and
(iii) the shares, provided in THIRD (A) of this Publishing Agreement, of the proceeds received on disposition of the secondary rights; and

SECOND: The Publisher

A. shall publish same in book form on acceptance by it of the Literary Work on or before Spring 1983. For purposes of computing the royalty on the first hardcover publication, the suggested catalog retail list price shall be at least $10.00, even though Publisher's actual suggested catalog retail list price is lower.

B. shall copyright the Literary Work in the United States in the name of the Author;

C. shall pay the Author and advance of *** payable as follows:
*** on signing hereof;

*** on delivery and approval of one-half of the manuscript, as satisfactory to Publisher;
*** on delivery and acceptance of the complete manuscript, (including portions previously delivered and approved), as satisfactory to Publisher;
*** on publication of hard cover edition or on May 1, 1983 whichever is sooner.
*** on publication of mass-market paperback reprint edition or on November 1, 1984 whichever is sooner.

(i) royalties at the following rates, for sales of the trade edition (less returns):
*** of the suggested catalog retail price on the first 5,000 copies sold;
*** of the suggested catalog retail price on the next 5,000 copies sold; and
*** of the suggested catalog retail price on all copies sold thereafter;

(ii) of the net proceeds received on disposition of the other primary rights, except as otherwise provided herein;

(iii) in accordance with the special provisions in Part Five of the Basic Agreement, for sales by mail order, at special discount, as unbound sheets for export from reduced printings, to book clubs, or as excess stock, or for any quality paperback or textbook editions of the Literary Work published by the Publisher itself under one of its own imprints;

THIRD: The Publisher and the Author

A. agree to share the net proceeds received on disposition of the following secondary rights as follows and that Publisher is authorized exclusively on behalf of the Author to dispose of such secondary rights as are preceded by an asterisk:

Dramatic Rights	*** % to Author	*** % to Publisher
Motion Picture Rights	*** % to Author	*** % to Publisher
Allied Motion Picture Rights	*** % to Author	*** % to Publisher
Educational Picture Rights	*** % to Author	*** % to Publisher
Radio Rights	*** % to Author	*** % to Publisher
Television Rights	*** % to Author	*** % to Publisher
First Periodical Rights	*** % to Author	*** % to Publisher

Commercial Rights	*** % to Author	*** % to Publisher
Foreign Language Rights	*** % to Author	*** % to Publisher
British Commonwealth Rights	*** % to Author	*** % to Publisher

B. agree to be bound by all of the terms and conditions of the Basic Agreement which follows and which is made an integral part of this Publishing Agreement; and

C. agree to the following special provisions, which shall prevail over any conflicting provisions in the Basic Agreement:

See Rider attached hereto and made part hereof.

/s/
Nicholas Pileggi

/s/
Henry Hill
Authors

Dated: September 1, 1981

/s/
Michael Korda
Simon & Schuster

BASIC AGREEMENT

Relating to the Agreement dated September 1, 1981 between Simon & Schuster, Publisher, and Henry Hill and Nicholas Pileggi, Author, for the publication of Untitled Autobiographical Non-Fiction about the Mafia.

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Rider to Agreement between Simon & Schuster and Henry Hill & Nicholas Pileggi, for the publication of: Untitled Autobiographical Non-Fiction about the Mafia

Redacted

PART ONE
Definition of Terms

As used in this Basic Agreement and in the Publishing Agreement:

Primary Rights.
1. "Primary Rights" shall mean all of the rights defined in Part One (2) through (13) inclusive. The territory within which such rights are exercisable is set forth in Part Three (46). "Secondary Rights" as and to the extent expressly defined in Part One (15) through (23) inclusive are excepted from implied comprehension within the definitions of Primary Rights.

Trade Edition Rights, Trade Editions.
2. "Trade Edition Rights" shall mean the exclusive right to publish, or authorize others to publish, trade editions of the Literary Work referred to in the Publishing Agreement. "Trade Editions" shall mean the first edition of the Literary Work in book form, and all other editions in book form except those referred to in the next paragraphs.

Book Club Rights.
3. "Book Club Rights" shall mean the exclusive right to authorize book clubs to print and sell the Literary Work in book form.

Mass Market Paperback Reprint Rights.
4. "Mass Market Paperback Reprint Rights" shall mean the exclusive right, after the publication of the first trade edition, to authorize others (not including book clubs) to publish, other editions of the Literary Work in formats designed primarily for mass market distribution through such channels as chain store outlets and news and magazine wholesalers.

Quality Paperback Edition Rights.
5. "Quality Paperback Edition Rights" shall mean the exclusive right to publish, or authorize others to publish, other editions of the Literary Work at less than the catalog retail price of the most recent trade edition, but at more than the catalog retail price of any mass market paperback reprint edition which has been authorized.

Textbook Rights.
6. "Textbook Rights" shall mean the exclusive right to publish, or to authorize others to publish, the Literary Work in textbook form, for distribution to or use in educational or other similar institutions.

Book Selection Rights.
7. "Book Selection Rights" shall mean the exclusive right, after publication of the first trade edition, to include, or to authorize others to include, in anthologies and other works in book form, including, without limitation, in dramatic form, selections from, parts of, and/or photographs, charts, maps, drawings, index, illustrations and other illustrative or decorative material from the Literary Work, to the extent that the Publisher deems appropriate, provided that no such selection to be included in any one book shall exceed approximately 10,000 words from or 10% of the length of a work of prose (whichever is shorter), one short story from a collection of stories, three complete poems from a collection of poems, or one act from a play.

Abridgment or Condensation Rights.
8. "Abridgment or Condensation Rights" shall mean the exclusive right, after the publication of the first trade edition, to publish, or to authorize others to publish, either as part of a book (as distinguished from a periodical), or as a separate book publication, an abbreviated version of the Literary Work, not exceeding two-thirds of the original version in length, all of which must be (i) in the original text, if it is an abridgment, or (ii) approved in writing by the Author, if it is a condensation.

Periodical Selection Rights.
9. "Periodical Selection Rights" shall mean the exclusive right, subject to any limitations required under any prior disposition of first periodical rights, to authorize others to publish in magazines or newspapers selections from, parts of, and/or photographs, charts, maps, drawings, index, illustrations and other illustrative or decorative material from the Literary Work, for the purpose of aiding or exploiting the sale of the Literary

Work, provided that no such selection to be included in any one magazine or newspaper shall exceed approximately 2,000 words from a work of prose, one short story from a collection of stories, two complete poems from a collection of poems or one scene from a play.

Second Periodical Rights.
10. "Second Periodical Rights" shall mean the exclusive right, after the publication of the first trade edition, to publish, or to authorize others to publish, the Literary Work in magazines or newspapers - either in full as a serial, or in an abbreviated version (abridged or condensed) which shall exceed approximately 30,000 words or one-half of the length of the Literary Work (whichever is less), or as a selection which shall exceed approximately 2,000 words from a work of prose, one short story from a collection of stories, two complete poems from a collection of poems, or one scene from a play.

Transcription Rights.
11. "Transcription Rights" shall mean the exclusive right to use or adapt the Literary Work, or any portion thereof, as a basis for phonographic, tape, wire, magnetic, electronic, light wave amplification, photographic, microfilm, microfiche, electronic audio-video, or audio-visual recordings, slides, filmstrips, transparencies, programming for any method of information storage, reproduction or retrieval, and for any other forms or means of copying or recording (now known or hereafter devised) the text of the Literary Work, including recordings made for the blind.

Digest Rights.
12. "Digest Rights" shall mean the exclusive right, either simultaneously or after the publication of the first trade edition, to publish, or to authorize others to publish, in any magazine — whether devoted exclusively to abbreviated versions, or consisting primarily of other material — an abbreviated version (abridged or condensed) of the Literary Work, which version shall be complete in one issue and shall not exceed approximately 30,000 words or one-half of the length of the Literary Work, whichever is less.

Other Publishing Rights.
13. "Other Publishing Rights" shall mean all publishing rights not specifically enumerated herein, whether now in existence or hereafter coming into existence.

Secondary Rights.
14. "Secondary Rights" shall mean all the rights defined in Part One (15) through (23) inclusive. The territory within which such rights are exercisable is set forth in Part Three (47).

Dramatic Rights.
15. "Dramatic Rights" shall mean the exclusive right to use, or to authorize others to use, the Literary Work, title, plot, episodes, events, scenes and characters depicted therein, in whole or in part, for (i) writing a dramatic version thereof, or a drama in any way based thereon and (ii) producing or performing either of the above on the stage.

Motion Picture Rights.
16. "Motion Picture Rights" shall mean the exclusive right to use, or to authorize others to use, the Literary Work, title, plot, episodes, events, scenes and characters depicted therein, in whole or in part, for the purpose of making motion pictures primarily for exhibition in regular commercial channels, and the right to grant the allied motion picture rights.

Allied Motion Picture Rights.
17. "Allied Motion Picture Rights" shall mean (i) the exclusive right to condense, or to authorize others to condense, the Literary Work, or the commercial motion picture treatment thereof, into not more than 7,500 words, for the purpose of promoting motion pictures based on the Literary Work, and (ii) such limited radio or television rights as are customarily granted for the purpose of using those mediums to promote motion pictures based on the Literary Work.

Educational Picture Rights.
18. "Educational Picture Rights" shall mean the exclusive right to use, or to authorize others to use, the Literary Work, in whole or in part, in making motion pictures primarily for exhibition for educational purposes.

Radio Rights.
19. "Radio Rights" shall mean the exclusive right to use, or to authorize others to use, the Literary Work, title, plot, episodes, events, scenes and characters depicted therein, in whole or in part, for AM, FM or other broadcasting.

Television Rights.
20. "Television Rights" shall mean the exclusive right to use, or to authorize others to use, the Literary Work, title, plot, episodes, events,

scenes and characters depicted therein, in whole or in part, for broadcast performances on television other than closed circuit television for private viewing by limited audiences.

First Periodical Rights.
21. "First Periodical Rights" shall mean the exclusive right, before the publication of the first trade edition, to publish, or to authorize others to publish, the Literary Work in magazines or newspapers — either in full as a serial, or in an abbreviated version (abridged or condensed) which shall exceed approximately 30,000 words or one-half of the length of the Literary Work (whichever is less), or as a selection which shall exceed approximately 2,000 words from a work of prose, one short story from a collection of stories, two complete poems from a collection of poems, or one scene from a play.

Commercial Rights.
22. "Commercial Rights" shall mean the exclusive right to use, or to authorize others to use, in whole or in part, the Literary Work, the title of the Literary Work, and the names and characterizations of characters created in the Literary Work, as a basis for (i) trademarks or trade names for other products, or (ii) toys or games.

Foreign Language Rights.
23. "Foreign Language Rights" shall mean the exclusive several rights to authorize others to translate the Literary Work in whole or in part, and to adapt same for translation into one or more foreign languages, and to publish and sell, or to authorize others to publish and sell, such translations in any part of the world.

British Commonwealth Rights.
23(a). "British Commonwealth Rights" shall mean the exclusive several rights to publish and sell and to authorize others to publish and sell the Literary Work in the English language in the British Commonwealth as constituted at the date of this agreement exclusive of Canada, Australia and Israel.
23(b). Whichever party controls Foreign Language or British Commonwealth rights to the Work shall control all publishing rights thereto. Non-publishing secondary rights shall in all instances be controlled by the party who is otherwise authorized to dispose of such rights pursuant to this agreement.

Author's Unshared Secondary Rights.
24. "Author's Unshared Secondary Rights" shall mean all secondary rights as to which, under Part THIRD (A) of the Publishing Agreement, the Author is to retain all the proceeds from disposition.

Shared Secondary Rights.
25. "Shared Secondary Rights" shall mean all secondary rights as to which, under Part THIRD (A) of the Publishing Agreement, the Author and the Publisher are to share the proceeds from disposition.

Sale or Disposition of Rights.
26. A "Sale," "Disposition" or "Grant" of rights shall include an assignment, transfer, bargain or license of the rights referred to or of any interest or option relating to such rights.

Proceeds on Disposition of Primary Rights.
27. "Proceeds on Disposition of the Primary Rights" shall mean the gross amount received on the sale or disposition of such primary rights, less any costs and expenses incurred by the Publisher in connection with or by reason of such sale or disposition.

Proceeds on Disposition of Secondary Rights.
28. "Proceeds on Disposition of the Secondary Rights" shall mean the gross amount received from the sale or disposition of such secondary rights, less any commissions which may be paid for services rendered in connection with such disposition, either to the Author's agent designated in the Publishing Agreement or to any agent authorized by the Publisher to dispose of such secondary rights. Moreover, if either (i) any other persons shall have rendered services which contributed to the value of any of the secondary rights and shall have become entitled to receive a share of the proceeds of disposition thereof (e.g., a dramatizer, a theatrical producer or a translator of the Literary Work), or (ii) upon a sale of the motion picture rights a portion of the proceeds shall be payable to the Dramatists Guild of the Authors League of America, Inc., then the amounts paid to such other persons shall also be deducted from the gross amount received from the sale or disposition of such secondary rights in order to determine the amount to be shared between the Author and the Publisher.

Final Form.
29. "Final Form" shall mean a complete, legible, typewritten manuscript of the Literary Work (including photographs, charts, maps,

drawings or index, if any of these are required), acceptable to the Publisher in content and form and ready for the printer.

Agreed Publication Date.
30. "Agreed Publication Date" shall mean the date on which the Publisher has agreed in the Publishing Agreement to publish the Literary Work.

Actual Publication Date.
31. "Actual Publication Date" shall mean the date on which the Publisher first offers the first trade edition of the Literary Work for sale to the public.

Base Royalty Rate.
32. "Base Royalty Rate" shall mean the royalty rates provided in Part SECOND(C)(i) of the Publishing Agreement.

Mail Order Sales.
33. "Mail Order Sales" shall mean copies of the Literary Work sold directly to the consumer through (i) the medium of mail order coupon advertising, or (ii) direct-by-mail circularization.

Special Discount Sales.
34. "Special Discount Sales" shall mean any sales at a discount of more than 50% from the suggested retail price. Sales to book clubs shall not be included under special discount sales.

Agreement.
35. "Agreement" (or "this agreement") shall mean the Publishing Agreement and this Basic Agreement.

PART TWO
Author's Warranties

Except as otherwise specifically stated in Part THIRD (C) of the Publishing Agreement, the Author warrants and represents that:

Sole Author and Proprietor.
36. He is the sole Author and proprietor of the Literary Work.

Authority in Grant.
37. He has full power and authority to make this agreement and to grant the rights granted hereunder, and he has not previously assigned,

transferred or otherwise encumbered the same; and that he has no prior agreement, commitment, or other arrangement, oral or written, to write or participate in writing any other book-length work and will enter into no such agreement, commitment, or other arrangement until after delivery of the manuscript of the Literary Work in Final Form.

Not Previously Published.
38. The Literary Work has not been previously published.

Not in Public Domain.
39. The Literary Work is not in the public domain.

No Infringement.
40. The Literary Work does not infringe any statutory or common law copyright.

Not Libelous.
41. The Literary Work does not invade the right of privacy of any third person, or contain any matter libelous or otherwise in contravention of the rights of any third person; and, if the Literary Work is not a work of fiction, all statements in the Literary Work asserted as facts are true or are based upon reasonable research for accuracy.

Not Unlawful.
42. The Literary Work contains no matter which is obscene or matter the publication or sale whereof otherwise violates any federal or state statute or regulation thereunder, nor is it in any other manner unlawful.

Not Injurious.
42(a). Nothing contained in the contents of the Literary Work shall be injurious to the health of the user.

Permissions.
42(b). The Author agrees that should he incorporate in the Literary Work any writings, drawings, photographs or other material either previously published or not, either of his own or another artist or writer, he shall prior to delivery of the Literary Work in Final Form obtain and, whenever requested by Publisher, shall deliver to the Publisher proper and complete written permission and authorization from the owner of the common law or statutory copyright or other right to use the same in the Literary Work or for the purpose of promoting or advertising the Literary Work throughout the world.

Investigation by Publisher.
43. The Publisher shall be under no obligation to make an independent investigation to determine whether the foregoing warranties and representations are true and correct; and any independent investigation by or for the Publisher, or its failure to investigate, shall not constitute a defense to the Author in any action based upon a breach of any of the foregoing warranties.

Effect of Warranties and Representations.
44. The warranties and representations of Author hereunder are true on the date of the execution of this agreement and shall be true on the date of the actual publication of the Literary Work, and at all intervening times. The Publisher may rely conclusively on the truth of the warranties and representations herein in dealings with any third party in connection with exercise or disposition of any rights in the Literary Work.

Warranties to Survive Termination.
45. Each of the foregoing warranties and representations shall survive the termination of this agreement.

* * * * *

PART FIVE
Royalties and Other Payments

Computation of Royalties Generally.
63. Royalties shall be computed on the basis of the number of copies actually sold by the Publisher, less returns. No royalties shall be computed on copies given away for review or promotion, nor on copies given to the Author.

On Mail Orders and Special Discounts.
64. On mail order sales and special discount sales the royalty shall be 5% of the net amount actually received from such sales.

On Sheet and Export.
65. On unbound sheet sales and sales for export of the trade editions of the Literary Work, royalties shall be calculated on the net amount actually received from such sales. No royalty will be payable to the Author with respect to any unbound sheet sales or full copy sales for export where such copies are furnished to a foreign licensee at the Publisher's cost plus a handling charge for such sheets and/or copies.

On Sales from Reduced Printings.
66. On sales made out of any new printings or bindings of 2,500 copies or less, made more than one year after publication date, royalties shall be computed at one-half the base royalty rates provided hereunder.

Royalty Statements and Payments
67. The Publisher shall render royalty statements and make accounting and royalty and other payments to the Author (i) in February for the preceding period April 1 to September 30, and (ii) in August for the preceding period October 1 to March 31. In lieu of rendering statements with respect to the periods provided in the preceding sentence, Publisher may at any time make a binding election to account to Author in semi-annual statements with respect to each six-month period ending on each successive annual and semi-annual anniversary of the month of first publication of the Work. Such statements shall be rendered within one hundred-twenty days after the end of each respective six-month period.

Details to Be Shown.
68. Royalty statements shall state the number of copies sold during the period covered. If the Author so requests, the Publisher shall, within 30 days after rendering the royalty statement, advise the Author in available detail of the number of copies printed, bound, sold, and given away during the period covered by the royalty statement, as well as the approximate number of salable copies on hand at the end of said period.

Book Club Sales.
69. On all sales to book clubs, the amount allocated as royalty or other compensation to the Publisher shall be divided equally between the Author and the Publisher. No royalty will be payable to the Author on unbound sheet sales or full copy sales to book clubs where such copies are furnished at the Publisher's cost plus a handling charge for such sheets and/or copies.

Certain Primary Rights Exercised by Publisher.
70. On the exercise of quality paperback reprint edition or textbook edition rights by publication under one of its own imprints royalties (but no further advance) shall be paid to the Author at the following rates based on the catalog retail price: (i) 6% on the first 25,000 copies sold within the United States, exclusive of sales specified in subparagraph (iii) below, and (ii) 7½% on all copies sold within the United States thereafter, exclusive of the sales specified in subparagraph (iii) below, and (iii) 3% on mail order sales, and on all copies sold outside the United States, and 5% of the

net amount received for copies sold at special discounts including copies sold in bulk to book clubs, premiums and incentives and other special sales, except that in no event shall such royalties exceed the excess, if any, of net proceeds received in respect of such sales, less the Publisher's manufacturing costs.

Excess Stock Sales.

71. When the Publisher believes that copies of the Literary Work are not readily salable at regular prices within a reasonable time, the Publisher may (but not earlier than 12 months from the actual publication date) dispose of such copies as surplus at the best price obtainable. Upon such disposition, the Author shall receive in lieu of all other royalties hereunder the excess over the Publisher's manufacturing costs up to 10% of the net proceeds of such disposition.

Payment of Advances.

72. The payment of advances to the Author, including such payment following delivery of the manuscript, shall not be deemed to be evidence either that the manuscript of the Literary Work is in content or form acceptable to the Publisher, or that the Author has complied with his warranties or other agreements hereunder.

Repayment of Advances.

73. Any advance royalties or other sums paid to or on behalf of the Author under this agreement or otherwise, and any other payments due from the Author to the Publisher, may be applied in reduction of any payments due to the Author under this agreement.

Security Interest.

74. To secure the advances made to Author, and payment of any other sums which may be or become due to Publisher hereunder, Author hereby grants to Publisher (i) a security interest under the Uniform Commercial Code in the manuscript to be delivered by him to Publisher hereunder, said security interest to attach to the manuscript as and when it is written, and to any and all outlines, drafts, notes, and written background material relating thereto; and (ii) the right to immediate possession, at any time upon demand, of the said manuscript, outlines, drafts, notes, permissions, consents, and background material. Author agrees to execute and deliver to Publisher, in form requested by Publisher, a financing statement and such other documents which Publisher may require to perfect its security

interest in the said manuscript, outlines, drafts, notes and background material.

Reserve for Returns.

75. Any amounts payable to the Author hereunder shall be subject to such reserve for returns of copies of the Literary Work as the Publisher shall establish in its reasonable discretion.

Author's Right to Examine Books of Account.

76. The Author may, upon written request, examine the books of account of the Publisher in so far as they relate to the Literary Work, for the period of two years immediately preceding such examination.

Author's Agent.

77. If the Author has an agent, as indicated by the inclusion of an agent's name and address in the Publishing Agreement, until receipt by the Publisher of written notice by the Author canceling the agent's authority hereunder, all payments accruing to the Author under this agreement shall be made to such Author's agent, and the receipt by the Author's agent shall constitute a full and valid discharge of the Publisher's obligations for such payments under this agreement. Author's agent is fully authorized to do and perform all acts on behalf of the Author in all matters arising out of or under this agreement, and the Publisher may conclusively rely upon such authority until actual receipt by Publisher of written notice, signed by the Author, canceling or limiting such authority. No such revocation or limitation shall affect the validity of any act of the agent prior to receipt of such notice by the Publisher to the extent that the Publisher has relied thereon.

PART SIX
Delivery of Manuscript and Correction of Proofs

Failure of Author to Deliver Work in Final Form.

78(a). Timely delivery of the Literary Work in Final Form is essential to the Publisher and is of the essence of this agreement. If the Author fails to deliver the Literary Work in Final Form within the time specified, the Publisher shall have an option to give the Author a notice in writing terminating this agreement, and in such event the Publisher may then recover and the Author agrees to repay on demand all amounts advanced to the Author.

(b). Additionally, the Publisher shall not be obligated to accept or publish the Literary Work if, in its sole editorial judgment, such work is not satisfactory to it. Provided, however, that if the Author shall, within the time specified, have delivered the Literary Work in what he represents to be its completed form, the Literary Work shall be deemed to be acceptable in content and form to the Publisher unless, within 90 days after receipt thereof by the Publisher, the Publisher shall give to the Author a notice in writing stating that in its editorial judgment the work is not acceptable to it, in which case this agreement shall thereupon terminate and the Publisher may then recover and the Author agrees to repay on demand all amounts advanced to the Author. If Publisher so elects, in lieu of such notice, it may give written notice to the Author stating the particular respects in which the submitted manuscript is unacceptable, including, without limitation, reservations or questions of the Publisher concerning matters within any of the warranties, representations and agreements contained in Paragraphs 36-42. Any written request by or on behalf of the Publisher for changes in or for substantiation or confirmation of any statement in the Literary Work shall be deemed, without any need expressly to say so, to constitute notice that the manuscript is then unacceptable to the Publisher without responses satisfactory to the Publisher, and that it has not been accepted. If such request be made of the Author or his agent, unless the Publisher shall otherwise agree in writing, failure of the Author, within 60 days after the date of such request, to respond to the satisfaction of the Publisher in respect to all subject matter of such request shall have the same significance and effect as failure to deliver a manuscript in Final Form after a notice as provided in the second sentence of this Paragraph 78. Correspondingly, a 90-day period within which the Publisher may reject a Literary Work in the exercise of its editorial judgment or for non-compliance to its satisfaction with a request for changes, substantiation or confirmation, shall run from the last date on which the Author purports to have submitted responses in compliance with the Publisher's request for changes, substantiation or compliance. A request for changes or substantiation or confirmation as aforesaid shall not preclude other similar requests prior to the elapse of such 90-day period, or within a new like period after the receipt by Publisher or Author's tendered compliance with Publisher's request.

Delay for Author's Illness.

79. If, however, because of illness or any other factor beyond his control, the Author is unable so to deliver the Literary Work, the date for

such delivery shall be extended for a reasonable time. If after the elapse of such reasonable time the Author continues to fail or is unable to deliver the Literary Work or to satisfy the Publisher's request(s) for changes or substantiation, the Publisher may give written notice of termination, effective at the expiration of 60 days or such longer period as the Publisher may specify in such notice, and if the Author shall fail to deliver the manuscript in Final Form within such 60 days or specified longer period, as the case may be, this agreement will be terminated at the expiration of said period, and the Publisher may recover all amounts advanced to the Author. If the Author dies prior to acceptance by the Publisher whether or not following delivery of the manuscript in Final Form, the Publisher, in its sole discretion, may terminate this agreement upon giving a written notice of termination to the Author's personal representatives within 90 days of receipt by Publisher of notice of his death, in which case the Publisher may then recover from such personal representatives all amounts previously advanced hereunder.

Failure to Deliver Photos, Charts, etc.

80. If the Author fails to deliver photographs, charts, maps, drawings, or the index, in cases where any of these are required for the Literary Work, the Publisher shall have the right (but not the obligation) to cause the same to be prepared and to charge the cost of such preparation to the Author.

Correction of Proofs.

81. The Publisher shall supply the Author with one set each of galley and, at its option, page proofs, and the Author shall return each set of proofs with his corrections to the Publisher within 21 days of receipt thereof. The Publisher shall also proofread the proofs. If, because of his own fault, the Author shall fail to return the corrected proofs within the 21-day period herein specified, the Publisher may publish the Literary Work without the Author's approval of the proofs — provided, however, that if, because of illness or any other factor beyond his control, the Author informs the Publisher that he is unable so to return the corrected proofs, his time for correcting such proofs shall be extended for another 21-day period, and after that period the Publisher may publish the Literary Work without the Author's approval of the proofs.

Cost of Author's Alterations.

82. If, in the correction of galley and page proofs, the Author requests changes from the text of his manuscript, the Author agrees to pay to the

Publisher the cost of such changes, over 15% of the original cost of composition, provided that, at the Author's request, the Publisher shall submit an itemized statement of such charges, and shall make available corrected proofs for the Author's inspection at the Publisher's office.

No Obligation to Publish.

83(a). Notwithstanding anything contained herein to the contrary, in no event shall the Publisher be obligated to publish the Literary Work if, in its sole and absolute judgment, the Literary Work contains libelous or obscene material, or its publication would violate the right of privacy, common law or statutory copyrights, or any other rights of any person. In such event, Publisher shall be entitled on demand to the return of all monies advanced to the Author hereunder, and to terminate this agreement. Notwithstanding any request by Publisher for change or substantiation, nothing in this agreement shall be deemed to impose upon the Publisher any duty of independent investigation or relieve the Author of any of the obligations assumed by him hereunder.

(b). The Publisher shall not be obligated to publish the Literary Work if, whether before or after acceptance thereof, supervening events or circumstances since the date of this agreement have, in the sole judgment of the Publisher, materially adversely changed the economic expectations of the Publisher in respect to the Literary Work at the time of the making of this agreement, and in such event all of the Publisher's rights in and to the Literary Work shall terminate and revert to the Author on the giving by the Publisher to the Author of notice of its decision, or, if the Publisher fails to do so, by the Author pursuant to Paragraph 84, and in any such event, the Author shall be entitled to retain all payments to the Author theretofore made under this agreement.

PART SEVEN
Delays in Publication

Delays Due to Publisher's Fault.

84. The Publisher, in its sole and absolute discretion, shall have the right to reschedule publication of the Literary Work beyond the agreed publication date for a reasonable time and also in the event of late delivery by the Author of the manuscript in Final Form. Thereafter, if publication of the Literary Work is delayed in the absence of excusable circumstances the Author's sole and exclusive remedy shall be to give the Publisher a

notice in writing, stating that if the Publisher fails to publish the Literary Work within 180 days after the date of such notice, then all of the Publisher's rights in and to the Literary Work shall terminate at the end of such 180-day period; and if, in such event, the Publisher shall fail to publish the Literary Work within such 180-day period, all of the Publisher's rights in and to the Literary Work shall terminate and revert to the Author, and the Author shall be entitled, as liquidated damages and in lieu of all damages and remedies, legal or equitable, to retain all payments therefore made to Author under this agreement.

Delays Not Due to Publisher's Fault.

85. If publication is delayed beyond the agreed publication date because of acts or conditions beyond the control of the Publisher or its suppliers or contractors, including (by way of illustration and not by way of limitation) war, shortages of material, strikes, riots, civil commotions, fire or flood, the agreed publication date shall be extended to a date six months following removal of the cause of the delay.

PART EIGHT
Disputes

Dispute Between Parties.

86. In the event of any dispute under this agreement arising between or among the parties, any party may request any other party to agree to submit such dispute to arbitration in the City of New York in accordance with the then rules of the American Arbitration Association. Absent an agreement to arbitrate, exclusive jurisdiction for the determination of any such dispute solely between or among parties to this agreement is hereby vested in the Supreme Court, New York County, or, at the election of either party if the jurisdictional prerequisites at the time exist, in the United States District Court for the Southern District of New York, and each party hereto agrees to submit to the jurisdiction of either such court in the City and State of New York for the determination of any such dispute, and hereby consents (in addition to service of process by any other means provided at the time by law) to service of process on him or it, as the case may be, by registered mail, first class postage prepaid, return receipt requested, addressed to the defendant named in such process at the address to which notices may be given pursuant to Paragraph 106 of this

agreement, and that notice by mail so given shall be deemed to confer jurisdiction upon such court.

PART NINE
Indemnification and Defense of Litigation

Indemnification by Author.

87. The Author shall indemnify and hold the Publisher harmless against any loss, liability, damage, cost or expense arising out of or for the purpose of avoiding any suit, proceeding, claim or demand or the settlement thereof, which may be brought or made against the Publisher by reason of the publication, sale, or distribution of, or disposition of rights in respect to, the Literary Work, based on the contents of the Literary Work, except in connection with matters inserted in the Literary Work by or at the direction of the Publisher or involving solely controversies arising out of or based on commercial transactions between the Publisher and the customer.

Notice of Suits Brought.

88. Prompt notice of any such non-excepted suit, proceeding, claim or demand brought or made against the Publisher or Author shall be given to the Author or Publisher respectively.

Cost of Defending Suits.

89. If any such non-excepted suit, claim or demand is brought or made, the Publisher may elect (i) to undertake the defense thereof, or (ii) to notify the Author to undertake the defense. If the Publisher does so notify the Author, the Author shall undertake such defense; and in such cases the Publisher may, at its option, join in the defense. In all the foregoing events the cost and expense of any defense shall be borne by the Author, unless (a) such suit, claim or demand arises solely out of an act or omission of the Publisher, in which case the cost and expense shall be borne by the Publisher, or (b) the Author has, pursuant to notification from the Publisher, undertaken the defense and the Publisher at its option elects to join with the Author in the defense, in which case the total cost and expense (including reasonable counsel fees) shall be shared equally by the Publisher and Author.

Publisher May Withhold Payments.

90. Whenever any such non-expected suit, claim or demand is instituted, the Publisher may withhold, payments due to the Author under this agreement between the Author and the Publisher, subject, however, to the Author's right to draw on such sums to defray his expenses in connection with such suit, claim or demand. If a final adverse judgment is rendered in such a suit and is not discharged by the Author, the Publisher may apply the payments so withheld to the satisfaction and discharge of such judgment.

PART TEN
Infringement by Others

Suits, by Publisher or Author.

91. If during the existence of this agreement the copyright, or any other right in respect to the Literary Work, is infringed or violated, the Publisher may, at its own cost and expense, take such legal action, in the Author's name if necessary, as may be required to restrain such infringement and to seek damages therefor. The Publisher shall not be liable to the Author for the Publisher's failure to take such legal steps. If the Publisher does not bring such an action, the Author may do so in his own name and at his own cost and expense. Money damages recovered for an infringement shall be applied first toward the repayment of the expense of bringing and maintaining the action, and thereafter the balance shall be divided equally between the Author and Publisher.

PART ELEVEN
Withdrawal from Publication

If Discontinued or Out of Print.

92. If, at any time after the expiration of two years from the actual publication date, either of the following events occurs:

(i) the Publisher notifies the Author in writing that the Publisher intends to discontinue publication of both the trade and textbook editions of the Literary Work; or

(ii) the Publisher allows all editions of the Literary Work to go out of print and does not place any edition on sale within six months after the Author has made a request therefor in writing, and if there is

no English language or foreign language reprint edition authorized by Publisher available or contracted for,

the Author may by a notice in writing (a) revoke the Publisher's right to publish any further copies of the trade editions of the Literary Work; (b) revoke the grant to the Publisher of such of the other primary rights as the Publisher has not already exercised or disposed of; (c) revoke any power given to the Publisher to dispose of such secondary rights as have not already been disposed of; and (d) revoke any grant of rights made to the Publisher in the Publishing Agreement to share in the proceeds on disposition of such secondary rights as have not already been disposed of. In such event the Author shall have the right to purchase any available plates or film of the Literary Work at cost, and/or any remaining copies or sheets of the Literary Work at the Publisher's manufacturing cost. If the Author does not purchase such plates, copies or sheets, the Publisher may melt the plates, and may sell the copies or sheets at any price and retain the proceeds of the sale.

PART TWELVE
Breach by Publisher

Termination for Substantial Breach.

93. Except as otherwise specifically provided in this agreement, if the Publisher shall commit a substantial breach of this agreement and shall fail to remedy the breach within 60 days after receiving a written notice by registered mail from the Author requesting the Publisher to remedy such breach, the Author may by a notice in writing (i) revoke the Publisher's right to publish the trade editions of the Literary Work, if it has not already been published at such time; (ii) require the Publisher to cease further publication of the trade editions of the Literary Work, if it has already been published at such time, but in such event the Publisher shall be permitted to sell all copies of those editions of the Literary Work which have already been printed or are in the process of being printed; (iii) revoke the grant to the Publisher of such of the other primary rights as the Publisher has not already exercised or disposed of; (iv) revoke any power given to the Publisher to dispose of such secondary rights as have not already been disposed of; (v) revoke any grant of rights made to the Publisher in the Publishing Agreement to share in the proceeds on disposition of such secondary rights as have not already been disposed of. In such event the Author shall have the right to purchase any available

plates or film of the Literary Work at cost, and/or remaining copies or sheets of the Literary Work already printed at the Publisher's manufacturing cost. If the Author does not purchase such plates, copies or sheets, the Publisher may melt the plates, and may sell the copies or sheets at any price and retain the proceeds of such sale. Any right of the Author pursuant to Paragraph 76 shall survive such termination.

PART THIRTEEN
Bankruptcy or Insolvency of Publisher

Bankruptcy, Receivership, Assignment for Creditors.

94. If the Publisher is finally adjudicated a bankrupt, or if a receiver is appointed, or if an assignment is made for the benefit of creditors, the Author may by a notice in writing (i) revoke the Publisher's right to publish the trade editions of the Literary Work, if it has not already been published at such time; (ii) require the Publisher to cease further publication of the trade editions of the Literary Work, if it has already been published at such times, but in such event, if the Author consents in writing, the Publisher shall be permitted to sell all copies of those editions of the Literary Work as have already been printed or are in the process of being printed (provided that if the Author has died, or if the Author does not answer the Publisher's request for such consent within a reasonable time, or if after reasonable diligence the Publisher has not succeeded in informing the Author that such consent is desired, the Author shall be deemed to have given his consent), (iii) revoke the grant to the Publisher of such of the other primary rights as the Publisher has not already exercised or disposed of, (iv) revoke any power given to the Publisher to dispose of such secondary rights as have not already been disposed of, and (v) revoke any grant of rights made to the Publisher in the Publishing Agreement to share in the proceeds on disposition of such secondary rights as have not already been disposed of. For the purposes of this PART THIRTEEN, "the Publisher" shall include successors in interest of the Publisher, including a trustee in bankruptcy, a receiver, or an assignee for the benefit of creditors. In such event the Author shall have the right to purchase all copies or sheets of the Literary Work in the possession of the Publisher and the plates therefor, at the then fair market value as determined by arbitration under the then rules of the American Arbitration Association. If the Author does not purchase such plates, copies or sheets,

the Publisher may melt the plates, and sell the copies or sheets at any price and retain the proceeds of such sale.

PART FOURTEEN
Miscellaneous Provisions

Publisher Shall Determine Style, etc.
95. The format, style of printing and binding, and all other matters relating to the manufacture, sale, distribution and promotion of the Literary Work shall be determined at the sole discretion of the Publisher. The Publisher may not make any changes in the manuscript of the Literary Work without the consent of the Author, except that the Publisher may make changes (i) in the capitalization and punctuation of the Literary Work, to make it conform to the Publisher's accepted style, or (ii) in the spelling and punctuation of a British edition of the Literary Work, to make it conform to American usage.

Title Changes.
96. The title of the Literary Work as set forth in the Publishing Agreement may be changed by mutual agreement of the Author and the Publisher.

Single Author to Represent.
97. When there is more than one author, any one (and an alternate) may be designated in the Publishing Agreement to act on behalf of all the authors jointly, and the Publisher may rely on the acts of the Author or his alternate so designated as representative of and binding upon all the Authors; and in the absence of such designation, the Publisher may deal with any one of the Authors as the agent and representative of all, and may rely on the acts of such Author-representative as binding on all the Authors. When there is more than one author, unless the Publishing Agreement specifies otherwise or until receipt by the Publisher of contrary instructions, the Publisher may assume that all Authors share equally in proceeds payable hereunder and may either issue separate checks in equal amounts payable to each Author severally or single checks payable jointly to all Authors.

Price Changes.
98. The Publisher may change the catalog retail price of the trade editions provided its royalties on trade editions sales are calculated on a

retail price not less than the minimum price fixed in the Publishing Agreement.

Free Copies for Author; Purchases by Author.
99. The Publisher shall present the Author with ten free copies of the first trade edition, and one free copy of any other edition published by the Publisher, upon publication. The Author shall have the right to purchase additional copies of the trade editions for his own use, and not for resale, at a 40% discount from the catalog retail price.

Publisher to Execute Documents.
100. If any of the rights granted to the Publisher revert to the Author, the Publisher shall execute all documents which may be necessary or appropriate to revest all such rights in the Author.

Acceptance of Agreement.
101. The agreement shall be binding on the Publisher only when it is accepted by an authorized officer of the Publisher.

Laws Applicable to Agreement.
102. The agreement shall be construed in accordance with the laws of the State of New York.

Agreement Binding on Successors in Interest.
103. The agreement shall be binding upon and inure to the benefit of the executors, administrators and assigns of the Author, and upon and to the successors and assigns of the Publisher.

Modification of Agreement.
104. The agreement may not be modified, altered or changed except by an instrument in writing signed by the Author and the Publisher.

Waivers Are Not Cumulative.
105. No waiver of any term or condition of this agreement, or of any breach of this agreement or of any part thereof, shall be deemed a waiver of any other term or condition of the agreement or of any later breach of the agreement or of any part thereof, nor shall publication or continued publication or payment by the Publisher following notice or claim of facts which, if true, would constitute a breach of warranty, representation or agreement of the Author, constitute or imply any waiver by the Publisher of any defenses, rights or remedies of the Publisher.

Notices.

106. All notices to be given hereunder by either party shall be in writing and shall be sent by registered mail to the other party at the respective addresses as they are given in the Publishing Agreement, unless said addresses are changed by either party by a notice in writing to the other party.

Singular Shall Include Plural.

107. Whenever required by the context, the singular shall include the plural, and the plural the singular, and the masculine shall include the feminine and the neuter. The "Author" shall include the "Authors" if there are more than one.

Captions, Table of Contents, etc.

108. Captions or marginal notes, and the table of contents of this agreement are for convenience only, and are not to be deemed part of the agreement.

Memorandum of Publishing Agreement.

109. Publisher is authorized to record this Agreement, or a memorandum thereof, which Author shall execute, in the Copyright Office of the United States pursuant to Section 205 of the Copyright Law of the United States. To the extent, if any, that this Agreement and said memorandum shall conflict, the terms of this Agreement shall be controlling.

21 August 1981

Mr. Henry Hill
c/o Robert Simels, Esq.
Runes & Simels
400 East 54 Street
New York, New York 10022

Dear Henry,

The following when signed by the two of us shall confirm our agreement:

1. We agree to cooperate with each other in the preparation and sale of a book-length manuscript concerning your life ("the Work"). You agree to furnish me with all material relating to the subject matter which you possess or have access to. You shall also use your best efforts to help me gather material relevant to the manuscript from other sources.

2. (a) All monies received from the disposition of any and all rights to the Work throughout the world shall be divided between us as follows:

Printed page rights — *** to you, *** to me
Performance rights (motion picture, television, stage, radio) — *** to you, *** to me.

(b) I shall advance the cost of tapes and the transcription of the tapes and The Sterling Lord Agency, Inc. is authorized to deduct of such costs from your share of the monies under paragraph 2(a). Such costs will be shared equally between us but no additional expenses shall be shared without our prior mutual consent.

3. (a) We shall consult with each other regarding the manuscript of the Work and you agree to make yourself available at mutually convenient times for such consultation and conference.

(b) I shall have full editorial control. However I agree to accede to all reasonable requests by you to delete any heretofore private details as may constitute a physical danger to you or your family. It is understood that trial records and testimony are not considered private.

4. The Work will be by Nicholas Pileggi, and the title or subtitle will include your name if possible.

5. The copyright in the Work shall be secured in our joint names throughout the world.

6. (a) All contracts for the sale, lease or license of the Work shall be made by us jointly, and we each agree not to unreasonably withhold our consent to such agreements.

(b) We both agree to be bound by any clause the Publisher may require with respect to competing works, waiver of right of privacy, libel and slander.

7. Each party hereto warrants and represents to the other that any material written or provided by him in connection with the Work is not and will not be in any way a violation of a copyright or common law right or right of privacy or any other rights of any person, firm or corporation and that it contains nothing of a libelous, obscene or illegal character, and each party agrees to indemnify, defend and hold the other party harmless against any loss, damage, claim or action including reasonable attorneys fees and disbursements arising out of or relating to a breach of any of the foregoing warranties or the incorrectness of any of the foregoing representations. Each party agrees to give the other prompt written notice of the institution of any claim alleging any violation of the above warranties and representations.

8. We have heretofore employed and hereby designate The Sterling Lord Agency, Inc., 660 Madison Avenue, New York, NY 10021, our sole and exclusive agent in connection with this Work. All payments due or to become due to any of us in connection with the sale, lease or license of this manuscript shall be made to and in the name of said agent who is hereby authorized to give receipt for same in our behalf. For services rendered to us by said agent, we agree to pay and do hereby authorize our said agent to receive and retain ten percent (10%) of any and all monies payable to us in respect to said Work, except that our agent may retain 15% in the case of British sales, and 20% in the case of foreign language sales.

9. This agreement shall be binding upon each of us and our respective heirs, legal representatives, next of kin, successors and assigns. It cannot be modified, altered or changed except by further instrument in writing signed by us. Wherever executed, this agreement shall be deemed made in and governed by the laws of the State of New York applicable to agreements fully to be performed in this State.

Sincerely,

/s/

Nicholas Pileggi
The Sterling Lord Agency, Inc.
660 Madison Avenue
New York, NY 10021

Agreed to and accepted:

/s/

Henry Hill

/s/

AGREED TO AND
ACCEPTED AS FAR AS WE
ARE CONCERNED:
The Sterling Lord Agency, Inc.

NEW YORK STATE
CRIME VICTIMS BOARD LETTERHEAD

January 31, 1986

Simon & Schuster
1230 Avenue of the Americas
New York, New York 10020

Attn: Trade Publicity Department

Gentlemen:

It has come to our attention that you may have contracted with a person accused or convicted of a crime for the payment of monies to such person.

Section 632-a of the Executive Law of the State of New York provides in part:

> "Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the Board and pay over to the Board any moneys which would otherwise, by terms of such contract be owing to the person so convicted or his representatives. The Board shall deposit such moneys in an escrow account for the benefit of and payable to any victim of crimes committed by: (1) such convicted person; (2) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim within five years of the date of the crime, brings a civil action in a court of competent jurisdiction and recovers a money judgment against such person or his representatives."

The Crime Victims Board is charged with the implementation of this statute.

We, therefore, call upon you to provide within thirty days the following information on any contracts or agreements you may have with any person, representative or assignee of a person who has been accused or convicted of a crime:

1) Copies of all such contracts or agreements;
2) Name(s) of accused or convicted criminals, suspected assignee, or representative(s) contracted with;
3) Dollar amounts and dates of all payments made to date to such accused or convicted person or his representative(s).
4) Dollar amounts and location of funds owed but not yet paid to such accused or convicted person or his representative(s), with anticipated date(s) of payment;
5) Estimate of dollar amounts which may be owed to such accused or convicted person in the future;
6) Description, location and dates of crimes committed;
7) Names of any known victims of such crimes.

We particularly request the above information regarding the following:

HENRY HILL/Publication of *WISEGUY*

We ask that you suspend payments on any contracts which may be potentially covered by the new law.

Upon receipt of the above requested information, you will be notified further concerning the disposition of any monies effected by this law.

Your prompt cooperation in this matter is appreciated. If you desire any additional information or have any questions concerning the requested information, please contact the undersigned. For your information a copy of the full statute and the Board's Rules regarding §632-a of the Executive Law is enclosed.

Very truly yours,

/s/

Paul S. Hudson, Counsel

PH:jt
Enclosures

NEW YORK STATE
CRIME VICTIMS BOARD LETTERHEAD

January 31, 1986

Mr. Nicholas Pileggi
c/o Simon & Schuster
Trade Publicity Department
1230 Avenue of the Americas
New York, New York 10020

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It has come to our attention that you may have contracted with a person accused or convicted of a crime for the payment of monies to such person.

Section 632-a of the Executive Law of the State of New York provides in part:

> "Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the Board and pay over to the Board any moneys which would otherwise, by terms of such contract be owing to the person so convicted or his representatives. The Board shall deposit such moneys in an escrow account for the benefit of and payable to any victim of crimes committed by: (1) such convicted person; (2) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim within five years of the date of the crime, brings a civil action in a court of competent jurisdiction and recovers a money judgment against such person or his representatives."

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Very truly yours,

/s/

Paul S. Hudson, Counsel

PH:jt
Enclosures

SIMON & SCHUSTER LETTERHEAD

May 22, 1986

Paul S. Hudson, Esq.
Counsel
Crime Victims Board
97 Central Avenue
Albany, New York 12206

Re: "*Wiseguy*" by Nicholas Pileggi

Dear Mr. Hudson:

On behalf of Simon & Schuster, Inc. and Nicholas Pileggi, and in response to the Board's request for certain documents and information relating to the publication of *Wiseguy*, I am enclosing copies of the following:

1. A Publishing Agreement, dated September 1, 1981, executed by Simon & Schuster, Henry Hill and Nicholas Pileggi.

2. Two letter amendments, dated December 22, 1982 and September 8, 1983 respectively, each extending the manuscript delivery date under the Publishing Agreement and each executed by Simon & Schuster and by the Sterling Lord Agency, Inc., as agent for Messrs. Pileggi and Hill.

3. Agreement, dated August 21, 1981, executed by Nicholas Pileggi, Henry Hill and the Sterling Lord Agency, Inc. concerning the preparation and sale of a book length manuscript.

Please be advised that, as of the date of this letter, Simon & Schuster has made the following payments, under the Publishing Agreement, to the Sterling Lord Agency for the account of Mr. Hill:

October 10, 1984	$ 19,250
October 14, 1984	19,250
May 2, 1985	19,250

July 15, 1985	9,625
July 25, 1985	28,875
	$ 96,250

As we have discussed, I am providing the foregoing documents and information in an effort to cooperate with the Board but subject to full reservation of our rights with respect to questions concerning the application and constitutionality of Section 632-a of the Executive Law in general and, in particular, as applied to the publication of *Wiseguy*. Further, in providing the enclosed documents I am relying upon your opinion and the Board's confirmation that these documents and the information contained therein are "trade secrets" within the meaning of § 87(b)(2)(e) of the Public Officers Law and will therefore be accorded confidential treatment. As we discussed, I understand and accept that such treatment will not be given to information concerning the amount of the payments made for the account of Mr. Hill under the Publishing Agreement.

Please call if you have questions concerning the enclosed documents. Unless I hear from you to the contrary, I will conclude that the information provided herein satisfies the Board's Subpoena of May 1, 1986.

Very truly yours,

/s/

John C. Bender

JCB/hg
Enclosure

THE FOLLOWING EXCERPTS ARE REPRODUCED FROM AN ARTICLE PUBLISHED OCTOBER 12, 1987, IN *THE NEW REPUBLIC*

How social mobility — and drugs — are destroying the old code.

THE MAFIA AND THE MELTING POT

by Jacob Weisberg

Jacob Weisberg, a former TNR reporter-researcher, is an intern at *Newsweek*'s Washington bureau.

For the last 30 years experts have been regularly pronouncing the Italo-American Mafia dead. Sociologists theorize that social mobility killed it; they argue that Italians ought logically to follow the pattern of the Irish and the Jews, who abandoned their criminal activities when other paths to prosperity and political power became open to them in the early part of the century. Police officials and politicians point more straightforwardly to the success of their crackdowns and prosecutions of mob bigwigs. All of these accounts make a good deal of sense. In theory the Sicilianate Mafia should no longer exist. Yet the facts have lagged somewhat behind, proving the forecasters premature time and again.

Finally, however, they may have a case. Only in the last few years has evidence emerged that makes it possible to say, tentatively, that the twilight of the gangsters is upon us. As anyone who sees the New York City tabloids knows, the mob has had a tough year in court. Despite the surprising acquittals of John Gotti and other leaders of the Gambino clan, guilty verdicts in the recent "Mob Commission" and "Pizza Connection" show trials did serious damage to four of New York's still-regnant five families: Bonanno, Colombo, Genovese, and Lucchese. Bosses of the last three — "Fat Tony" Salerno, Tony "Ducks" Corallo, and Carmine Persico — are serving sentences ranging from 40 to 100 years.

Wiseguy: Life in a Mafia Family
by Nicholas Pileggi
(Simon and Schuster, 256 pp., $17.95; Pocket Books, $4.50)

Mafia Business: The Mafia Ethic and the Spirit of Capitalism
by Pino Arlacchi
translated by Martin Ryle
(Verso, 239 pp., $17.95)

The Underground Empire: Where Crime and Governments Embrace
by James Mills
(Doubleday, 1,165 pp., $22.95; Dell, $5.95)

Rudolph Giuliani, the flashy and ambitious U.S. attorney in Manhattan, deserves a great deal of credit. He has put new investigative and prosecutorial tools to good use in dogging the mob. Most important, he has employed sophisticated electronic surveillance and the RICO statute, which enables him to crack down on the infiltration of legitimate business by criminal organizations. Giuliani combines high-tech law enforcement with a venerable psychological technique for attacking the mob. What appears to many as mere showboating and publicity-mongering is actually an age-old method perfected by Italian cops.

Giuliani's progenitor is not Eliot Ness but Cesare Mori, the nemesis of the Sicilian Mafia in the 1920s. He was fond of issuing personal challenges to individual Mafiosi and mimicking their braggadocio. Like Giuliani, Mori realized that the battle for public opinion was essential to his war on the mob. After making a public bid for the affection of the community that harbored and tolerated them, Mori made the pretense of challenging the Mafiosi to a fair fight, insisting that in a frank struggle for supremacy, his legal weapons were stronger than their illegal ones.

Of course the overreaching claims of such lawmen should be taken skeptically; hyperbole is one of their weapons. Contrary to popular mythology, for example, La Cosa Nostra has never been a centrally directed conspiracy, here or in Italy. It can easily survive decapitation.

The five families have accomplished many successions in the past, and Mafia kingpins are adept at conducting diplomacy from prison cells. The Fat Tonys weren't going to be around for long in any case; natural causes and occupational hazards such as after-dinner gunfire tend to solve the problems of septuagenarian mobsters soon enough.

In fact, the Mafia is showing symptoms of internal maladies far more dangerous than its current legal tribulations. Among the most fascinating material that emerged in the recent prosecutions were recordings of the old timers lamenting the decline of respect and obedience among the rank and file in their organizations. One tape played at the Mob Commission trial captured a heartsick Salerno bemoaning a feckless underling who had the temerity to call him Fat Tony to his face. When Tony Ducks suggested curing the upstart with a dose of lead, Salerno said he was just too blue to order a rubout. He told Ducks that he'd rather retire from a mob where there was no appreciation for his seniority and achievements.

Another poignant moment occurred when

Aniello Dellacroce, a capo in the Gambino clan, took time out from threatening to bury an insubordinate soldier in "some fucking hole someplace" to utter the modern mobster's lament:

> Things change now because there's too much conflict. People do whatever they feel like. They don't train their people no more. There's no more — there's no more respect. If you can't be sincere, you can't be honest with your friends — then forget about it. Ya got nothin'.

Dellacroce was struggling for an English equivalent of the Italian *omerta*, the code of honor that has always assured the integrity of the Mafia's internal proceedings on both sides of the Atlantic.

After more than a hundred years, the system of *omerta* is no longer functioning very well. Here and in Italy, *uomini di 'onore*, men of honor, are now talking to the cops, copping pleas, and testifying against their former friends and employers. Most important, the owners aren't signing new players. New York's five families, as well as Sicily's great *cosche*, have experienced a crisis in recruitment. According to a recent New York Police Department report, the average age of local Mafiosi is over 60. It is this evidence of terminal anemia more than a few important convictions that substantiates Giuliani's claim that 1987 is "the Mafia's worst year."

Unfortunately the situation at the moment is not so simple as tough-guy Giuliani winning the war against the "scumdogs," as Geraldo Rivera called the Mafiosi on his recent sensationalistic television special, "The Sons of Scarface." The mob Giuliani has tackled represents only one cultural grouping, and no longer the most significant. For many years the Sicilians have been yielding hard-won turf to leaner, and sometimes meaner, mobs based in South America and Asia.

Indeed, the old mob never adapted very well to the drug trade, and that has become far and away the most important category of criminal activity, dwarfing traditional Mafia enterprises such as extortion, protection, and robbery in the amounts of both money and violence it generates. The Fat Tonys and Big Tunas symbolize organized crime's colorful past, but it is the new immigrants — Chinese, Mexicans, Vietnamese, and Colombians — who represent its worrisome future.

Nowhere has the story of how drugs are destroying La Cosa Nostra been better captured than in Nicholas Pileggi's *Wiseguy*, the as-told-to account of a mid-level gangster. Henry Hill was 11 in 1955 when he wandered out of his Brooklyn home into the Euclid Avenue Taxicab and Limousine Service in Brownsville-East New York, Brooklyn, looking for a job. The owner of the cabstand was one Paul Vario, a capo in the Lucchese family,

who liked the kid and put him to work shining Cadillacs. Hill, half-Sicilian despite his name, moved quickly from collecting numbers and selling beer to minors to fencing stolen property and passing counterfeit bills: crimes for apprentice wiseguys.

By 14, he was collecting $190 a week for a no-show construction job and practicing his arson technique. Hill logged his first arrest at 16 for trying to buy snow tires with a stolen credit card. After a stint in the Army, he moved on to a higher class of felony: hijacking, cargo theft, extortion. Pileggi accepts Hill's questionable assertion that although he witnessed murders and occasionally helped to bury bodies, he never killed anybody himself.

The most fascinating bits of description are Hill's nuts-and-bolts explanations of the hustles he worked — how he and his partners fixed horse races and college basketball games, how they shook down restaurant owners, how they fenced "swag," or stolen merchandise. Mundane details become scintillating when Hill describes the mechanics of, say, a truck-hijacking racket. Wiseguys (members of the Mafia) cooperated with truckers in "give-ups." A driver would take a coffee break and leave his keys in the ignition. By the time he'd reported the disappearance of his truck to the police, a $200,000 haul was already being unloaded in a cooperative warehouse. Hill and the other thugs would protect the "give-up" guys when their bosses tried to fire them. The glee in his voice is evident as Hill relates the specifics: how he and his pals disarmed alarms and copied addresses off the licenses of drivers lest they be tempted to testify against the gangsters.

As in compulsive gambling, there is a thrill that racketeers seem to derive from stealing that far outstrips their greed. Though clearly in its grip himself, Hill exhibits a remarkable understanding of this criminal psychology. Early in the book, he relates how his mentor, Paul Vario, though a multimillionaire, loved few things so much as old-fashioned credit card fraud:

> The fact that a guy like Paul Vario, a capo in the Lucchese crime family, would even consider going out on a social occasion with his wife and run the risk of getting caught using a stolen card might surprise some people. But if you knew wiseguys you would know right away that the best part of the night for Paulie came from the fact that he was getting over on somebody. It wasn't the music or the floor show or the food — and he loved food — or even that he was going out with Phyllis, who he adored. The real thrill of the night for Paulie, his biggest pleasure, was that he was robbing someone and getting away with it.

The book contains other brilliant vignettes of crime fetishists: some who like to shoot, oth-

ers who love to con, and still others whose greatest joy in life is threatening and terrorizing innocents.

Perhaps the most hair-raising stories in the book have to do with the complicity of police and prison officials. Hill learned that if you get caught, things can usually be fixed. Lawyers can keep you out on bond. Testimony and evidence can be tampered with. And if you actually have to go to trial, it is possible to fix the jury. "Everybody reaches the jury," Hill says:

> During jury selection for instance, your lawyer can find out anything he wants to know about a juror — where he works, lives, family status. . . . The "where he works" is what interested me mostly. Where a guy works means his job, and that always means the unions, and that's the easiest place to make the reach.

When Hill was finally convicted of extortion and handed a ten-year sentence in 1972, he found that buying the guards could make jail a reasonably pleasant place. How tough was it? For a few hundred dollars a week, the occupants of the "honor dorm" at Lewisburg could get all the steaks and scotch they wanted. Contrary to myth, though, mobsters do not take care of each other's wives when their buddies get sent to jail; Hill's wife, Karen, had to supply his contraband business from the outside to support herself during his six-year term.

It was through prison smuggling that Hill was first introduced to drugs. When he arrived at Lewisburg, he had never rolled a joint. But ever the entrepreneur, Hill was soon running a pot, coke, and pills franchise inside the prison. He knew this was in strict violation of family rules, and that Vario would be furious; his patron would forgive anything but dope. He had outlawed drugs in his gang, not for moral reasons but because drugs draw heat. Since the world of narcotics trafficking is filled with informers, it is anathema to a closed network of men of honor. As Pileggi puts it, "There are no stand-up guys in the drug trade. It is a multibillion-dollar business in which it is understood that everyone is ratting out everyone else." Like Aniello Dellacroce and John Gotti, Vario knew that it means the end of the old way of doing business, of trusting your friends, of *omerta*.

As soon as he was sprung in 1978, Hill set up a heroin and cocaine dealership at his home in Rockville Centre, Long Island. He was soon selling eight kilos of cocaine a week and using a lot of the stuff himself. It was drug dealing, not his involvement in the sensational $6 million Lufthansa heist, that resulted in his getting busted and agreeing to testify. It was through one of his couriers, someone outside of the clan, that local police obtained a wiretap, and thereby the evidence to turn Hill into an informer himself.

BECAUSE HE'D been using drugs, Vario cut Hill loose. Because his fellow wiseguys had marked him for a hit, Hill asked to stay in prison. Faced with 25 years on a narcotics conspiracy charge, he made a deal with the FBI and entered the Federal Witness Protection Program. This is how the Mafia is being destroyed from within. Hill told the police everything he knew and testified against dozens of his former associates, including his godfather Vario, whom he sent to prison.

Pileggi brings his vivid portrait to a tidy close with a snapshot of Hill and his wife living in a $150,000 neocolonial house "somewhere in America," getting $1,500 a month for his testimony: "the ultimate wiseguy." Unfortunately, that wasn't exactly true by the time Pileggi's book was published. Hill was tossed out of the Witness Protection Program in 1984. Like many of the 4,400 other participants, he simply used his new identity to go on breaking the law. Pileggi is a crime buff, not a policy head, so it's not surprising that he ignores problems of this kind. Yet some analysis is called for. Pileggi merely attempts to let the facts speak for themselves; but sometimes they don't. He should have placed his story in local, national, or international perspective.

• • • •

CAPTION OMITTED

87 Civ. 5582 (RJD)

NOTICE OF CROSS-MOTION

PLEASE TAKE NOTICE that, upon the annexed affidavits of Angelo Petromelis, sworn to March 10, 1988, with exhibits annexed thereto, and of Patricia Eisenberg, Defendants' Statement Pursuant to Local Rule 3(g), and the accompanying Memorandum of Law, and upon all prior papers and proceedings herein, the undersigned, on behalf of the defendants, will cross-move this Court, before the Honorable Richard J. Daronco, United States District Judge for the Southern District of New York, in Courtroom 414 of the United States Courthouse, 40 Foley Square, New York, New York at 9:00 a.m. on the 18th day of April, 1988, for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting defendants summary judgment as a matter of law, denying plaintiff's motion for summary judgment, and granting defendants such other relief as the Court deems appropriate.

Pursuant to the parties' stipulation and court order, plaintiff's answering papers, if any, must be served no later than April 11, 1988.

Dated: New York, New York
March 14, 1988

Yours, etc.,
ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendants
By:

/s/

ANNE S. HASKELL
Assistant Attorney General
120 Broadway
New York, New York 10271
(212) 341-2568

To: RONALD S. RAUCHBERG
CHARLES S. SIMS
Proskauer Rose Goetz &
Mendelsohn
300 Park Avenue
New York, New York 10022
Attorneys for Plaintiff

CAPTION OMITTED

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ANGELO PETROMELIS, being duly sworn, deposes and says:

1. I am the Chairman of the Crime Victims Board ("the Board") and a defendant herein. I have been a member of the Board since June 10, 1976 and I have served as Chairman since September 18, 1987.

2. I am fully familiar with the facts and the practices and policies of the Board described herein. I submit this affidavit in support of defendants' cross-motion for summary judgment and in opposition to plaintiff's motion for the same relief.

A. Statutory Framework

3. Article 22 of the Executive Law is the Crime Victims Compensation Act (the "Act"), a remedial crime victims compensation scheme enacted in 1966, Law of New York ch. 894, which seeks to secure compensation for innocent crime victims and their families regardless of whether the perpetrator of the crime is ever apprehended and brought to justice. Exec. Law § 620 *et seq.* The Act creates the Board as an agency of the State of New York. Under Exec. Law § 623, the Board is charged with providing financial assistance to innocent victims of crime and their families to help pay for, *inter alia*, medical expenses incurred as a result of injuries sustained by a criminal act, essential personal property that has been lost, damaged or destroyed as a direct result of the crime, occupational therapy or similar rehabilitation services, lost earnings and burial expenses. Exec. Law § 631. The Board is also charged, *inter alia*, with advocating "the rights and interests of crime victims in the state before federal, state and local administrative, regulatory, legislative, judicial and criminal justice agencies." Exec. Law § 623(15).

4. The intent of the legislature in enacting the Act is clearly and eloquently set forth:

> The Legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may suffer disability, incur financial hardships, or become dependent upon public assistance. The Legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the Legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.

Exec. Law § 620.

5. Under the Act, crime victims may apply to the Board for compensation. The Board then determines whether an award should be granted and what amount should be paid. Exec. Law § 631.

6. The Act contemplates compensation of eligible crime victims, but only for certain losses and expenses and within specified limits. Exec. Law § 631. These cash grants are made available out of state and federal funds.

7. The Board becomes subrogated to and the claimant assigns, to the extent of the award, any right or right of action accruing to the victim resulting from the crime with regard to which the award is made. Exec. Law § 634(l)(a). Under Exec. Law § 634(2), acceptance of an award creates a lien in favor of the State on the proceeds of any recovery from the person liable for the injury or death upon which the award was based.

The Son of Sam Law

8. Under Executive Law § 632-a (the "statute"), commonly known as the Son of Sam Law, every person or entity who contracts with any person accused or convicted of a crime in New York State with regard to the reenactment of such crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment or from the expression of such person's thoughts, feelings,

opinions or emotions regarding such crime, must submit a copy of such contract to the Board and pay over to the Board any money owing to the accused or convicted person.

9. The Board must deposit such money in an escrow account for the benefit of and payable to any victim (or the victim's legal representative) of the convicted person's crime for five years. Exec. Law § 632-a(1). Once the money is escrowed, the crime victims then have five years to file a civil lawsuit and recover a money judgment against the criminal in order to claim on the money held in escrow. If a civil court judgment is obtained, the Board is authorized to satisfy it out of the escrow account. If a crime victim has already received compensation, the State is subrogated to his claims to the extent of those payments.

10. The Board is charged with the enforcement and administration of the Son of Sam Law and has promulgated rules to that effect. 9 New York Code of Rules and Regulations ("NYCRR") Part 526. The rules set forth the Board's responsibility to promptly investigate whether any transaction or other matter falls within the provisions of section 632-a. 9 NYCRR 526.1. Upon completion of its investigation, the Board issues a Proposed Determination and Order with regard to the transaction and informs all parties of their right to a hearing if they make objections within 30 days. 9 NYCRR 526. After all objecting parties have had an opportunity to present evidence and oral argument at an adjudicatory hearing, or if no objections are made, a Final Determination and Order is issued. Any aggrieved person may seek judicial review under Article 78 of the New York Civil Practice Law and Rules with regard to the Board's Final Determination and Order. Exec. Law § 632-a(12); 9 NYCRR 526.1. Any person may also obtain a declaratory ruling from the Board with regard to the application of the Son of Sam Law to any particular contract. 9 NYCRR 525.19.

11. The statute provides for a priority of distribution from the escrow account and assures that the victim will stand ahead of the judgment creditors or other persons claiming through the convicted person, as follows. First, the criminal offender may obtain payment from the escrow account upon a showing that the money will be used for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings. However, in combination with agent's fees, the escrow

account may not be invaded beyond twenty percent. Exec. Law § 632(a)(8). Second, the State is subrogated for awards made by the Board to crime victims and their families under section 634, not to exceed one-half of the civil judgment, if any, obtained by the victim. Civil judgments obtained by crime victims are third in priority. The fourth priority includes all other judgment creditors, including state and local government taxing authorities. Last in line is the criminal offender who is entitled to whatever monies remain after five years. Exec. Law § 632-a(11). The offender retains legal title to the funds in the account until they are paid out to the victim, the state, other judgment creditors, or to other creditors. Should the accused criminal be acquitted, the state is required to pay over immediately the escrowed funds to the formerly accused criminal. N.Y. Exec. Law § 632-a(4).

12. It should be noted that the Son of Sam Law was enacted partially in response to news reports that large sums of money were being offered to serial murderer David Berkowitz, a/k/a the Son of Sam, for the exclusive rights to the story of his crimes. As the author of the bill noted:

> It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured — while five people are dead, other people were injured as a result of his conduct. *This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.*

Memorandum of Senator Emanuel R. Gold, 1977 New York State Legislative Annual 267 (emphasis supplied).

13. The Legislature reaffirmed section 632-a in 1978 and 1981 with a variety of technical changes to clarify and strengthen the law to insure the original legislative intent. Among the definitional changes implemented were those intended to insure, *inter alia*: that the provisions of the statute apply to the legal representative of the victim as well as to the victim himself; that in order to be entitled to a distribution from the escrow account, the crime victim must recover a judgment *for damages* against the criminal offender; and that on dismissal of charges or acquittal of an accused person, the escrowed funds must be restored to him. In 1986, the statute was amended primarily to correct spelling errors. The New York Legislature has reasserted, through these amendments, the continuing

vitality of the Son of Sam Law and its belief that the law is necessary to assure proper compensation of victims of crimes and to deter criminals from profiting from their criminal acts.

14. Over forty states have enacted Son of Sam laws modeled after section 632-a. Some examples are as follows: Ala. Code § 41-9-80-84 (1983); Alaska Stat. § 12.61.020 (1980); Ariz. Rev. Stat. Ann. § 13-4202 (1978); Cal. Civ. Code § 2224.1 (West 1983); Fla. Stat. Ann. § 944.512 (West 1983); Ga. Code Ann. § (Supp. 1982); § 17-14-30 to 32 (1979); Idaho Code § 19-5301 (1979); Ind. Code Ann. § 16-7-3.7(1-6) (Burns 1983); Iowa Code ch. 910.15 (1982); Ky. Rev. Stat. Ann. § 46.1831-3 (West 1982); Mass. Gen. Laws Ann. ch. 258A, § 8 Michie/Law. Co-op 1980); Mo. Rev. Stat. § 595.045.11 (1985); Mont. Code Ann. § 53-9-104(2)(e) (1983); Neb. Rev. Stat. § 81-1836-1842 (Supp. 1986); Nev. Rev. Stat. § 217.265 (1981); N.J. Stat. Ann. § 52-4B-26 (1983); N.M. Stat. Ann. 31-22-22 (1983); Ohio Rev. Code Ann. § 2743.81 (Anderson 1982); Or. Rev. Stat. § 147.275 (1985); Pa. Stat. Ann. 71 § 180-7.18 (1984): R.I. Gen. Laws § 12-25.1-1 (1983); 1983 R.I. Pub. Laws 328; S.C. Code Ann. § 15-59-40 to 80 (Law. Co-op. Supp. 1982); S.D. Codified Laws Ann. § 23A-28A-l to 14 (Supp. 1982); Tenn. Code Ann. § 29-13-201 to 208 (1980); Tex. Civ. Code Ann. 8309 § 1-18 (Vernon 1980); Wash. Rev. Code Ann. § 7.68.200 to 280 (West Supp. 1982); Wis. Stay. Ann. § 950.04 (2A) (West Supp. 1984).

B. The Proceedings Involving Wiseguy

15. The following facts, ¶¶ 16-33, are taken from the Board's Proposed Determination and Order, dated May 21, 1987, involving the contract between Henry Hill, Nicholas Pileggi and Simon & Schuster regarding the writing and publishing of *Wiseguy*.

16. On or about April 27, 1980 Henry Hill was arrested in Nassau County and was charged in six indictments numbered 50764-50769 with Conspiracy to Sell Drugs.

17. In May 1980, Henry Hill entered into the Federal Witness Protection Program in exchange for his agreement that he would cooperate with various law enforcement agencies.

18. In the interest of justice the six indictments against Henry Hill were dismissed.

19. On August 21, 1981 Henry Hill and Nicholas Pileggi entered into an agreement (the "Agreement") whereby all monies received in the sale of a book length manuscript concerning Hill's life, to be prepared cooperatively by Hill and Pileggi, were to be divided between Henry Hill and Nicholas Pileggi, according to specified percentages for printed page and performance rights. The Agreement further provided that the Sterling Lord Agency was to receive and retain ten percent (10%) of any and all monies payable to Henry Hill and Nicholas Pileggi in respect of said work.

20. On September 1, 1981 Simon & Schuster and Henry Hill and Nicolas Pileggi entered into a contract known as a publishing agreement (the "Contract"). Under the terms of the Contract, Henry Hill and Nicholas Pileggi were named jointly as "Author."

21. The Contract provides for the payment of monies by Simon & Schuster to Author, to be divided between Henry Hill and Nicholas Pileggi, pursuant to the Agreement.

22. The work *Wiseguy* was published in 1985.

23. The work *Wiseguy* is Henry Hill's life story from 1955 when he first became involved with organized crime until May 1980 when he joined the Federal Witness Protection Program. It is a veritable catalog of crimes in which Henry Hill admits to the commission of various crimes and expresses his feelings, opinions or emotions regarding such crimes.

24. The Board first became aware of the possibility of a Contract between Henry Hill and Simon & Schuster in January, 1986.

25. On January 31, 1986, the Board by its Counsel sent certified letters to Simon & Schuster and Nicholas Pileggi requesting that a copy of the Contract and certain other information be turned over to the Board pursuant to Executive Law § 632-a.

26. On May 27, 1986, the Board received a letter from Simon & Schuster, signed by John C. Bender, Group Vice President and General

Counsel, which enclosed a copy of the Contract, a copy of the Agreement between Henry Hill and Nicholas Pileggi, and copies of two letter amendments to the Contract.

27. The correspondence received on May 27, 1986, from Simon & Schuster revealed that payments in the amount of $96,250.00 had already been made to the Sterling Lord Agency for the account of Henry Hill.

28. At present Simon & Schuster is holding approximately $27,958.00 due to be paid to Henry Hill pursuant to the Contract.

29. The Board reviewed the book entitled *Wiseguy*, authored by Nicholas Pileggi pursuant to the Contract and published by Simon & Schuster in 1985, and determined that it contains thoughts, feelings, opinions and emotions regarding crimes committed by Henry Hill as well as his admission to involvement in such crimes.

30. The Board issued its Proposed Determination and Order in respect of *Wiseguy*, dated May 21, 1987, and concluded the following. The Contract between Henry Hill, Nicholas Pileggi and Simon & Schuster, dated September 1, 1981, is of the type regulated by Executive Law § 632-a. As such, a copy of the Contract should have been turned over to the Board in 1981 at the time of execution for the Board's determination as to whether it came within the ambit of the statute. At the very least, a copy of the Contract should have been turned over to the Board prior to October 10, 1984, the date of the first payment by Simon & Schuster to Sterling Lord Agency for the account of Henry Hill. By failing to turn over a copy of the Contract to the Board and by paying $96,250.00 to Henry Hill without seeking any determination from the Board, Simon & Schuster violated Executive Law § 632-a.

31. The Board also determined that all monies paid to Henry Hill or to his representatives under the Contract should have been turned over to the Board to be held in escrow for the victims of crimes committed by Henry Hill and that future payments must be turned over to the Board.

32. The Board also determined that the Sterling Lord Agency as an agent of Henry Hill was a representative under Executive Law Sections 621(6) and 632-a, and was also required to turn over any monies received

or to be received under the Contract on account of Henry Hill, to the Board.

33. Nicholas Pileggi is a co-author and is not a representative of Henry Hill within the meaning of Executive Law § 632-a(1) and as such no monies due or owing him are subject to the mandates of Executive Law § 632-a.

34. The Sterling Lord Agency, pursuant to Executive Law § 632-a(8), made application to the Board for payment of necessary expenses for the production of monies paid into the escrow account to be established by the Board in this case. The Board held an adjudicatory hearing on December 9, 1987, to consider Sterling Lord's application and objections. That application is now pending before the Board.

35. Neither Simon & Schuster nor Henry Hill submitted objections to the Board's Proposed Determination and Order. The determination is not yet final, however, because Sterling Lord filed timely objections to it.

Responses To Plaintiff's Affidavits

36. First: Plaintiff's affiants' statements that the Son of Sam Law deters authors from writing books covered by section 632-a is based entirely on speculation and no author has come forward stating that he will refuse to write a book that may be covered by Section 632-a. *See e.g.*, Korda Aff. ¶¶ 11, 12; Lord Aff. ¶ 14; Hollingsworth Aff. ¶¶ 5, 6; McManus Aff. ¶ 3; Grann Aff. ¶¶ 3, 4. It should be noted that the statute was not designed to deter persons from writing books. Rather, the statute was enacted to prevent criminals from benefiting from their crimes to the detriment of victims by ensuring that money received by a criminal through depiction of the crime or the expression of the criminal's thoughts, feelings, opinions or emotions regarding such crime will first be made available to recompense the victims of that crime. It is notable that when the Board investigated a contract involving the sale of the story of the crimes committed by David Berkowitz (a/k/a the Son of Sam), Berkowitz explicitly expressed his wish that any money derived from the sale be paid to his victims and not to him. *See* letters from David Berkowitz, annexed hereto as Exhibit A.

37. Second: Affiants' statements that certain books previously written, such as *Blind Ambition* by John Dean, *Witness to History* by Armand Hammer, *Conversations With The Enemy* by Robert Garwood, and other books in the process of being written, such as Jesse Jackson's *A Time to Speak*, would not have been or may not be written under the Son of Sam Law, is inaccurate. Korda Aff. ¶¶ 11, 13, 14; Grann Aff. ¶ 5. Section 632-a applies only to books written about crimes committed in New York, not in other jurisdictions, and only to the extent that the particular work seeks to reenact the crime or to express the writer's views about the crime. Most of the books discussed in plaintiff's affidavits are not subject to this law. Even if they were, however, affiants' assertions are completely unsupported. I find it hard to believe that affiants feel comfortable making such an assertion without any evidence that these authors would have refused to write their books without immediate payments. These statements are pure conjuncture based upon plaintiff's assumption that authors will not write books without immediate payment.

38. Third: Sterling Lord's statement that section 632-a precludes his agency from being paid for works which may be subject to its terms (Lord Aff. ¶ 8) and that it forecloses his agency's involvement in any project to which it may apply (Lord Aff. ¶ 9) is an overstatement of the facts. Mr. Lord is presently seeking an order from the Board permitting payment of his fees and that matter is pending before us. Mr. Lord's concern can be addressed if the contract he negotiates with his clients makes it clear that his fee is to be paid separate and apart from any proceeds directed to the writer. Moreover, under the priorities set in section 632-a(11) it is the representatives of the convicted person who aided in the production of the money (*i.e.*, literary agents) who stand first in line to obtain payment from the escrow account. Moreover, Mr. Lord recognizes that there is Board precedent to pay the expenses of a literary agent because the Board granted the request of the Lantz Office, the literary agent of Jean Harris, to pay its commission with regard to the book, *Stranger in Two Worlds*.

39. Fourth: (a) Plaintiff's affiants' statements regarding the circumstances under which *Wiseguy* came to be published appear to be inconsistent with information in an affidavit provided to the Board by Sterling Lord ("Lord Aff. II") sworn to December 4, 1987, and annexed hereto as Exhibit B. Specifically, Michael Korda states that he and the Chairman of Simon & Schuster "conceived the idea" of publishing *Wiseguy*

(Korda Aff. ¶ 4) and that Korda contacted Sterling Lord for assistance in finding an appropriate author for a book about Henry Hill's story. Lord then suggested Nicholas Pileggi, states Korda, and Korda met with Pileggi concerning the proposed project. Korda Aff. ¶¶ 5, 6;

(b) However, Lord stated to the Board that Hill's attorney contacted him directly about having a book written concerning Hill's life story and that Lord "felt that a study of the inner workings of organized crime could be a meaningful and successful book providing insights into an important and special subject." Lord Aff. II ¶ 7. Lord then states that he arranged for Hill's attorney to speak with Pileggi concerning the writing of such a book and that Lord was then advised that Hill and Pileggi decided to work together to prepare and write such book. Lord Aff. II ¶ 8. Lord then states: "[d]eponent [Lord] *thereafter* had several talks over a period of three to four weeks with Mr. Michael Korda, Editor-in-Chief of Simon & Schuster, to attempt to interest Simon & Schuster in the book, and Simon & Schuster *then* advised deponent that it decided to acquire publication rights in the book." Lord Aff. II ¶ 9 (emphasis supplied).

(c) Accepting Sterling Lord's statements to the Board, plaintiff's argument that no book would be written unless Simon & Schuster paid Hill for his story is questionable. The plain fact is that Hill (through his agent, Sterling Lord) like any other vendor of a commercial commodity for sale approached plaintiff as a potential buyer of his goods (the proposed book). Simon & Schuster merely had to accept or reject the commodity offered at the vendor's terms of the sale. In contracting for Hill's goods, Simon & Schuster was duty bound to incorporate the mandates of Section 632-a into the terms of sale.

40. Fifth: (a) To the extent plaintiff's affiants also state that Henry Hill would not have cooperated with Nicholas Pileggi absent immediate payment, I wish to point out that subsequent events appear to me to raise a serious question as to the accuracy of this assumption. Specifically, I annex hereto as Exhibit C, a series of news articles and news summaries which demonstrate the following:

(b) Hill appeared on the ABC television news program, 20/20 in 1986 and, wearing a full beard as a disguise, discussed his lengthy career in organized crime. According to newspaper reports, a Martin Lewis of Redmond, Washington, urged his neighbors to watch that television program and apparently, they readily recognized him despite the

disguise. After Lewis was arrested on drug charges, his neighbors told reporters that Lewis had bragged "for years" that he was really Henry Hill of *Wiseguy* fame and, therefore, his arrest came as no surprise to them.

In sum, these materials demonstrate that Hill was eager to capitalize on his notoriety.

41. Sixth: I also wish to point out that plaintiff does not object to any disincentives to authors, such as Henry Hill, that might exist under other laws pertaining to enforcement or satisfaction of judgments. Specifically, Gerald E. Hollingsworth, the General Counsel of Random House, states in his affidavit, with regard to the successful effort by the estate of Richard Adan to attach royalty payments to Jack Abbott's book, *In the Belly of the Beast*, that "[w]e do not contend that crime victims who obtain tort judgments are prohibited by the First Amendment from obtaining satisfaction from the proceeds of expressive activity." Hollingsworth Aff. ¶ 9. I find it significant that plaintiff's affiant finds no First Amendment impediment concerning New York's general tort recovery provisions but objects to the Son of Sam Law which has as its primary purpose making available to victims funds to satisfy tort law judgments.

42. Seventh: Plaintiff's affiants also state that Section 632-a has the effect of allowing the Board to become an editorial reviewer of the content of published works or that it requires editors to delete material from books that may be covered by the statute. *See, e.g.*, Korda Aff. ¶ 15; McNamara Aff. ¶ 12; Constantine Aff. ¶ 3. To the contrary, the Board has no role in the content or subject matter of books other than to determine whether a particular work comes within the objective standards of the statute, *i.e.*, whether it reenacts the crime or expresses the criminal's thoughts, feelings or emotions about the crime. Once a work is covered, editors have no obligation to delete material from it — their only obligation is to turn over the payments to the Board for deposit in an escrow account.

43. Eighth: Plaintiff's affiants' assertions that the statute is vague is simply incorrect. *See, e.g.*, Korda Aff. ¶ 17; McNamara Aff. ¶ 13. Any publisher in the business of negotiating for the publication of a book by or about a criminal offender and his crimes must know whether the contract and the work contain any "reenactment of [the] crime . . . or the [criminal's] thoughts, feelings, opinions or emotions regarding such

crimes[.] Exec. Law § 632-a. This is an objective standard that we believe is easily ascertainable. To the extent a party has a question in a particular case, the Board has also adopted a mechanism to permit entities to obtain rulings from us concerning the applicability of a particular contract. 9 NYCRR 525.19; 526.1.

WHEREFORE, your deponent respectfully requests that defendants' cross-motion for summary judgment be granted in its entirety.

/s/

ANGELO PETROMELIS

SUBSCRIPTION OMITTED

January 29, 1979

State Supreme Court Justice
Honorable Carmine Ventieri
360 Adams Street,
Brooklyn, New York 11201

Dear Judge Ventieri,

I just read in the Rochester, New York newspaper that a movie and book is being written about me. No doubt I'm once again the last to know because of all the crooked deals that must be worked out beforehand.

I'm advising you that I am not going to cooperate in anyway with the writer or movie makers in this venture. I have no interest in such nonsense and if Hollywood wants to glorify my name and what I've done then let them.

Maybe after some disturbed person see's the movie he too will go out and kill some people then someone will make a movie about him, then another and another.

Secondly, I want to tell you that I do not wish to receive one single penny from any profits that will be made. I want nothing except to be left alone and spend the rest of my life in prison until I die, which will be soon because I have enemies. However, I'm not the least bit concerned.

Judge Ventieri, sir, I am also going to beg to you that you do not let the Moskowitz's or the Violante's make all the profits from the deal. Please, make sure that Joanne Lomino also gets a share of the royalties. Don't forget that she is more handicapped as a result of my actions then all the others combined. Please Make sure that everything is split fairly and don't let the crooked ones like the Moskowitz's get it all.

I would strongly desire that all the proceeds if possible go to the Victims Crime Compensation Board.

One last point please. I want you to realize that any story about me would be somewhat fictional since I made up the story about the

"demons". It wasn't really true. I'm the real "demon". I realize this now. However, I don't suppose it matters because people want to read something absurd and Hollywood knows it would sell better. I just thought I would let you know and I hope you will consider everything I've said.

Most Sincerely,

/s/

David Berkowitz
78-A-1976
Box 149
Attica, New York 14011

THE FOLLOWING IS A TRANSCRIPTION
OF A HANDWRITTEN LETTER

Dear Mr. Fisher,

At first I didn't want to correspond with you or anyone from the news media ever again. However, do to circumstances beyond my control I need you at this time for the purpose of reaching and having contact with the outside world. At this time I have no contact with the press and my lawyers and Doris Johnsen (conservator) have proved to be undependable and unconcerned about my welfare. They only have monetary interests at stake.

I sent a letter to Judge Ventiera expressly stating my personal views of the book-movie issue. I don't believe, however, that he is truly interested in my desires or interests.

Please note the inclosed letter dated Jan. 29, 1979, addressed to Judge Ventiera. An exact copy of this letter was sent to the judge to be read into the court records. I doubt if this was done. If it was, then I give him my apologies.

I believe at this time that Doris Johnsen and my lawyers have set up an underhanded, un-kosher deal which will make them wealthy while everyone else gets poorer. I cannot go into full details now.

Please note that the letter to Judge Ventiera completely expresses my desire and feelings on the book-movie venture.

I have also inclosed two letters with regards to my appeal. I have asked that all appeals be withdrawn, however, I feel that my lawyers may not turn these over to the proper authorities.

I wish nothing to do with Doris Johnsen or the deals that are being worked out.

I have lost contact with the outside world and not of my own choosing — please understand. I need you to get this letter out to the media or concerned parties. I am asking you to be my voice.

If you double cross me in any way, our contact will be permanently severed. I will see to it!

Doris Johnsen was appointed my conservator because Dr. Schwartz claimed I was incompetant and insane. Nothing could be further from the truth. Both my lawyers and Johnsen are not properly representing me. Technically they are suppose to and claim to, but in reality they are representing only themselves and their wishes. I repeatedly told them that I want the money to go to the Victims Crime Compensation Board and *not* to the conservatorship.

You wrote in your statement that I requested to be kept under constant surveillance. This is absurd. I never said this. I have a good job, I do my work and I move about as I please.

I realize that you will profit from this letter both money wise and with noteriety but I give you permission to print this letter.

PS: If you come through by delivering this letter to the proper people, then more letters will follow within time.

Sincerely,

/s/

David Berkowitz
78-A-1976
Box 149
Attica, N.Y. 14011

These inclosed letters must also be sent to the Media
INCL.
1-Remove Appeal 12/29/78-Notorized Official
2-Remove Appeal 1/5/79-Notorized Official
3-Letter to Judge Ventiera 1/29/79

Before the
STATE OF NEW YORK CRIME VICTIMS BOARD

In the Matter of

A Contract Between

HENRY HILL and NICHOLAS PILEGGI

and SIMON & SCHUSTER

AFFIDAVIT IN SUPPORT OF APPLICATION PURSUANT TO SECTION 632a(8)

STATE OF NEW YORK)
) SS.
COUNTY OF NEW YORK)

STERLING LORD, being duly sworn, deposes and says:

1. That deponent resides at 30 East 65th Street, New York, New York 10021.

2. That at the time of development and initial exploitation of the book entitled "WISEGUY" deponent was the President and Chief Executive Officer of The Sterling Lord Agency, Inc., a literary agency with offices at 660 Madison Avenue, New York, New York 10021-8441, and that since February 1, 1987 deponent has been and is the Chairman of Sterling Lord Literistic, Inc., the successor agency to The Sterling Lord Agency, Inc. with offices now located at One Madison Avenue, New York, New York 10010.

3. That deponent makes this Affidavit in support of the application of The Sterling Lord Agency, Inc. and its successors and assigns pursuant to Section 632(a) 8 of the New York Executive Law.

4. That deponent has been a literary agent and an agent for authors and others in the fields of print publication, television, motion pictures and the legitimate theatre since 1951, a period of more than thirty-six (36) years, as head of The Sterling Lord Agency, Inc. between 1951 and 1986 and since February 1, 1987 as Chairman of Sterling Lord Literistic, Inc., the successor agency to The Sterling Lord Agency, Inc.

5. That deponent and his agency have represented such authors as Jack Kerouac, Ken Kesey, Pierre Salinger, Nicholas Pileggi, Erica Jong, Howard Fast, David Wise, Joe McGinniss, Stan and Jan Bernstein, Walter Lord and Dick Schaap.

6. That deponent is a member of the Society of Authors Representatives, a major organization of literary agents, and that deponent served as Treasurer of such Society for thirteen (13) years.

7. That early in 1981 deponent was contacted by Robert Simels, Esq. on behalf of Mr. Simels' client Henry Hill. Mr. Simels stated that Mr. Hill had been given immunity from prosecution in connection with his testimony and cooperation with prosecutors concerning several criminal cases including the widely publicized robbery of the Lufthansa airline facility at John F. Kennedy Airport in New York City. Mr. Simels advised deponent that Mr. Hill was interested in having a book written concerning Mr. Hill's life story and that Mr. Hill was seeking a writer. Deponent felt that a study of the inner workings of organized crime could be a meaningful and successful book providing insights into an important and topical subject.

8. That deponent arranged for Mr. Simels to speak with Nicholas Pileggi, an established writer and a client of deponent's agency, concerning the writing of such a book. That deponent was then advised that Mr. Hill and Mr. Pileggi desired to work together to prepare and write such book.

9. That deponent thereafter had several talks over a period of three to four weeks with Mr. Michael Korda, Editor-in-Chief of Simon & Schuster, to attempt to interest Simon & Schuster in the book, and Simon & Schuster then advised deponent that it desired to acquire publication rights in the book.

10. That deponent on behalf of Messrs. Pileggi and Hill then negotiated the terms of a publication agreement with Simon & Schuster which resulted in the written and executed publication agreement dated September 1, 1981 (Exhibit "A" of the Proposed Determination and Order).

11. That since 1981 deponent and his staff have performed all of the customary and significant tasks and activities of literary agents in connection with the development, preparation and exploitation of the book and various rights in the book, including but not limited to advice to the

authors concerning both creative and business matters; review of and comments on drafts of manuscripts; liaison with correspondent agents in foreign countries concerning possible print publication arrangements for various other countries; solicitation of first serialization magazine licensees; negotiation for publication of serialized portions of the book by New York Magazine; solicitation of potential licensees of motion picture and television rights in the book; review of promotional and advertising plans; and related telephone calls, correspondence, meetings, conferences and negotiations.

12. That the agency commissions provided for in the written and executed agreement between Nicholas Pileggi and Henry Hill dated August 21, 1981 (Exhibit "B" of the Proposed Determination and Order) are the commissions then and now customarily charged by deponent to the clients of his agency; that such commissions are reasonable; and that to the best of deponent's knowledge, such percentage commissions are the same as (and in some cases less than) those charged by the major literary agencies.

13. That deponent does not anticipate that hereafter deponent will incur any significant expenses to be chargeable to or reimbursed by Messrs. Pileggi and Hill except for the required applicable commissions.

14. That the publication agreement with Simon & Schuster was obtained solely by and as a direct result of the efforts of deponent, deponent having initially brought the project to the attention of Simon & Schuster and having negotiated all terms of such publication agreement.

15. That Sterling Lord Literistic, Inc., as successor to The Sterling Lord Agency, Inc., now has and will continue to have the continuing regular responsibilities of a literary agency to monitor the publication and sales of the book by Simon & Schuster and other publishers and to seek to arrange for and to negotiate terms for the exploitation of the book and various rights in the book in all media throughout the world.

16. That literary agents perform many vital functions and duties in connection with the organization, development, writing, publication and exploitation of books and rights therein in various media, and if the Board determines that normal and customary agency commissions are not a necessary expense in the production of income which the agent is entitled to receive, no literary agent is likely to agree to represent any convicted

felon in connection with literary works or other materials where the proceeds may be payable to the escrow fund of the Crime Victims Board.

17. That it is deponent's understanding that in the recent Matter of A Contract Between JEAN HARRIS and MACMILLAN, INC., the Final Determination and Order of the Board provided that the agency involved in that matter, The Lantz Office, was entitled to retain past and future commissions based on monies payable to Jean Harris or her representatives or assigns for the production of the literary work there involved and arising out of the publication of such work or the sale, lease, license or other disposition of rights therein and thereto; that deponent believes that the application in this matter relates to a substantially identical set of relevant facts and circumstances; and that deponent believes that the determination of the Board in such recent other Matter is a clear precedent for a similar determination in this matter.

/s/
STERLING LORD

SUBSCRIPTION OMITTED

THE FOLLOWING EXCERPTS ARE REPRODUCED FROM ARTICLES PUBLISHED MAY 9, 1987 AND MAY 22, 1987 IN THE *JOURNAL-AMERICAN* [NEWSPAPER — WA]

MAFIA MOBSTER BRAGGED ABOUT PAST

Redmond neighbors aware of 'Wiseguy'
By **Monte Enbysk** and **Mike Ullmann**
Journal-American Staff Writers

Residents of a pleasant subdivision in north Redmond said Friday their neighbor Martin Lewis has bragged for years that he is really Henry Hill, the Mafia mobster whose story was told in the best-selling book *Wiseguy*.

And local police and drug-enforcement officials say they believe him.

After Lewis, 43, was arrested for investigation of drug charges at a downtown Redmond restaurant last week, he told authorities he is Hill.

Lewis, who has lived on the Eastside for at least five years, is being held in custody without bond following a U.S. magistrate's determination Thursday that there was enough evidence to charge him with conspiracy and possession of cocaine with intent to deliver.

Travis Kuykendall, assistant special agent in charge of the Drug Enforcement Administration office in Seattle, said Lewis told agents that he had been relocated to Redmond by the federal witness protection program.

Assistant U.S. Attorneys Kenneth G. Bell said Friday he was unable to confirm or deny whether Lewis had participated in the witness program and it will take two to three weeks to determine whether Lewis' fingerprints match Hill's. But, he said, "it is our belief that he is the Henry Hill portrayed in the book, *Wiseguy*."

Residents of the 48-home Valley Estates subdivision, next to Lewis' rustic ranch house, say they've believed Lewis' story for some time.

"He doesn't hold anything back. He brags about his book, and about how rich and famous he's going to be," said Yvonne Bakker, an 18-year-old model who lives in the subdivision, who keeps her horse in the Lewis'

stables and who considers herself the best friend of Lewis' 18-year-old daughter.

"I feel so bad for the family. They don't deserve what's going on. Whatever happens to him is his problem," Bakker said of Lewis.

Many neighbors said they've read *Wiseguy*, which describes Hill's life as a low-level Mafia mechanic who took part in murders and had knowledge of the 1978 Lufthansa robbery in New York. And a year ago, when Henry Hill, wearing a fake beard, appeared on the nationally televised ABC news program *20/20*, Lewis told some of the neighbors to be sure to watch the show.

Yvonne Bakker and her mother, Monique, recorded the program on their video-cassette recorder.

"You can tell it's him (Lewis) especially by his voice," Monique Bakker said.

"Even though he was disguised with a fake beard, it was pretty obvious it was him," said Kirby McManus, whose house is located along the long driveway leading to Lewis' home.

McManus said he was a bit shocked to hear the latest news about his neighbor, but not entirely. "It seemed to fit in because of the way these people live. He obviously didn't work . . . There seemed to be a lot of people coming and going from the house, in various states of reality."

McManus said the family — Lewis, his wife and daughter — made numerous acquaintances in the neighborhood but didn't usually participate in neighborhood activities.

Lewis' wife is a hairdresser in Redmond, neighbors said.

According to *Wiseguy*, Henry Hill was a mobster in the Queens section of New York City for 25 years, gradually working his way up the ladder with repeated success in pulling off crimes.

Hill was arrested in a narcotics conspiracy in 1980. At the time, federal prosecutors also wanted to talk with him about the $6 million Lufthansa robbery at John F. Kennedy International Airport, the largest successful cash robbery in U.S. history.

Nicholas Pileggi, who wrote *Wiseguy* with Hill's help, said Hill ultimately decided to join the Witness Security Program when he learned old associates planned to kill him.

Under the federal Witness Security Program, government witnesses whose lives are endangered are given second chances in life in return for their testimony. They are relocated, given new names, even aided in finding new jobs and careers, according to Bill Dempsey, spokesman for the U.S. Marshals Service headquarters in McLean, Va.

He would neither confirm nor deny whether Hill is, or has been, in the program. "We're hamstrung; we cannot comment on individual cases," Dempsey stressed.

Redmond police have never been officially told whether the Justice Department secretly moved Hill to the Eastside, said Chief Steve Harris, although "we've had some information for a long time that it was probably him."

"He's bragged to his whole neighborhood that he is Henry Hill, that he is the guy in the book, *Wiseguy*."

Harris said it is his understanding that the Justice Department does not tell local authorities about relocated witnesses, nor would he expect such notification.

"I think they did exactly what they're supposed to do, to keep him unidentified, and they did that," he said. "I suppose if he had been murdered then I would have gotten a phone call to tell me who he really was."

The police chief said Redmond officer, who arrested Lewis repeatedly for traffic violations, were suspicious of him. "We always thought he was doing a lot of things, but we never come up with much on him," Harris said.

By whatever name, Lewis hasn't exactly been a good neighbor since he moved to the Eastside.

"The whole neighborhood's been upset at him," said Chief Harris.

Court records show Martin T. Lewis pleaded guilty in 1985 to a charge of second-degree burglary, and has been convicted of or pleaded guilty to

at least 10 traffic-related offenses in the last five years, including driving while intoxicated and negligent driving.

At the time of his arrest last week, Lewis was awaiting a July 8 jury trial in Redmond's Northeast District Court on a charge of being a habitual traffic offender.

Part of his burglary record has been sealed by King County Superior Court for reasons that could not be determined Friday afternoon. The Lewis listed in the court records has the same birth date — June 11, 1943 — as does Henry Hill.

Redmond police and the multi-agency Eastside Narcotics Task Force were made aware of the federal investigation, and Redmond police provided assistance, according to the agent.

PURPORTED MAFIA FIGURE INDICTED

By **Monte Enbysk**
Journal-American Staff Writer

A Redmond man who claims he is a Mafia informant whose life was chronicled in the best-seller, *Wiseguy*, has been indicted by a federal grand jury on two counts of trafficking cocaine.

According to the U.S. Attorney's office, the indictment against Martin Todd Lewis, 43, and two other Eastside men was returned in U.S. District Court in Seattle on Wednesday.

Court records state that Lewis is also known as Henry Hill, the former Mafia mobster in New York City who entered the federal Witness Security Program, was relocated and given a new identity.

The federal Drug Enforcement Administration said early this month it would prove whether or not Lewis is Hill by comparing fingerprints. Results of the fingerprint tests have not been received by the DEA office in Seattle, a spokeswoman said Thursday.

Lewis' arraignment is scheduled for 9 a.m. next Thursday before federal magistrate John Weinberg. He is being represented by Seattle attorney Allan Ament.

Lewis and two others, Jose Fernando Siejo-Borgo of Redmond and Karl Alden Wing of Bothell, were named in the same indictment for what the grand jury alleged was a "conspiracy" to distribute cocaine.

The three are being held by federal authorities.

From at least April to May 1, the trio "did conspire with each other and with other persons known and unknown to the grand jury to distribute cocaine," alleges the first count of the indictment.

According to the second count, the three on May 1 "knowingly and intentionally did distribute ... and did aid and abet in the distribution of cocaine." The grand jury further alleges conspiracy charges.

Lewis was arrested the evening of May 1 at a downtown Redmond restaurant.

Court documents charge that Lewis arranged to sell a pound of cocaine to an informant. The cocaine was allegedly delivered to the informant and an undercover federal Drug Enforcement Administration agent by Siejo-Borgo and Wing.

The two delivery persons were immediately taken into custody after giving the agent 11.5 ounces of the drug outside a Kirkland restaurant for $10,400. Lewis was arrested later.

During an interrogation, Lewis told DEA agents he is Hill — who was featured last year on the ABC-TV news program *20/20*. Hill, wearing a fake beard for disguise, talked about his rise to prominence during a 25-year career in organized crime, and why he left the mob.

After being arrested in 1980 for drug charges, Hill said federal prosecutors wanted to talk to him about the $6 million Lufthansa robbery at John F. Kennedy International Airport.

Hill said he decided to join the Witness Security Program about that time because he learned his old associates were out to kill him. He said if he was ever located by Mafia leaders, "I'd be a dead man."

Lewis and his wife, a Redmond hairdresser, and 18-year-old daughter have lived in a ranch-style house just north of the Redmond city limits since 1982. Neighbors say it is common knowledge among them that Lewis is Henry Hill because he has bragged a great deal about his past and because he looks and talks exactly like the man interviewed on *20/20*.

Lewis has a long list of traffic-related offenses locally and has also been charged with burglary.

The U.S. marshals office, which operates the Witness Security Program, will not confirm or deny whether Lewis is Hill. One federal source who did not want to be identified said he seriously doubted whether Hill would remain a federally protected witness after revealing his life story in a book.

STATE OF NEW YORK :
COUNTY OF KINGS :

PATRICIA EISENBERG, being duly sworn, deposes and says:

1. I reside at 7600 Shore Front Parkway, Rockaway Beach, New York, 11692.

2. In 1970, I was married to William Bentvana, a/k/a Billy Batts.

3. On or about December 13, 1970, my husband left our marital residence in Valley Stream, New York, and was never seen nor heard from again.

4. After reading the book, *Wiseguy*, I learned for the first time in fifteen (15) years what had happened to my husband. The revelations in the book were both shocking and distressing.

5. Our sons and I have suffered financially and emotionally from the crime described by Henry Hill in his book, *Wiseguy*. We intend to make a claim individually and on behalf of my husband's estate for monies obtained by the New York Crime Victims Board.

/s/
PATRICIA EISENBERG

SUBSCRIPTION OMITTED

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SIMON & SCHUSTER, INC.,

Plaintiff,

— against —

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE McGRATH, and ANGELO PETROMELIS, individually and in their official capacities,

Defendants.

87 Civ. 5582 (JFK)

JUDGMENT

Both parties having moved for summary judgment, pursuant to F.R.Civ.P. 56, and the said motions having come before the Honorable JOHN F. KEENAN, U.S.D.J., and the Court thereafter on October 26, 1989, having handed down its opinion and order (#65087); denying plaintiff's motion for summary judgment; granting defendant's cross-motion for summary judgment; dismissing the complaint and removing the case from the active docket of the Court, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiff's motion for summary judgment be and it is hereby denied, and it is further,

ORDERED, that defendant's cross-motion for summary judgment be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed, and it is further,

ORDERED, that the case be and it is hereby removed from the active docket of the Court.

DATED: New York, New York
October 27, 1989

/s/
[Raymond R. Burghardt]
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 10/30/89

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of CHILDREN OF BEDFORD, INC. and MACMILLAN, INC.,

Petitioners,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules Annulling the Determination entered October 26, 1987 declaring the ordering that a certain book entitled "Stranger in Two Worlds" written by Jean Harris is subject to Executive Law Section 632-a,

— against —

ANGELO PETROMELIS, GENNARO A. FISCHETTI, GEORGE L. GROBE, JR., and DIANE McGRATH, constituting the Crime Victims Board of the State of New York,

Respondents.

ANSWERING AFFIDAVIT

Index No. 29562/87

STATE OF NEW YORK)
)
COUNTY OF ALBANY)

LORRAINE FELEGY, being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice in the courts of New York State and am Counsel to the New York State Crime Victims Board located at 97 Central Avenue, Albany, New York 12206.

2. I am fully familiar with the facts set forth herein and I submit this affidavit in support of respondents' answer to the petition in the above proceeding.

Statutory Authority

3. The Crime Victims Board (the "Board") is an agency of the State of New York and was established pursuant to Article 22 of the Executive Law (Executive Law Section 620 *et seq.*), to provide, *inter alia*, financial assistance to innocent victims of crime and their families.

4. The intent of the legislature in enacting Article 22 is clearly and eloquently set forth in the statute:

> The Legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may suffer disability, incur financial hardships, or become dependent upon public assistance. The Legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the Legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.

Executive Law Section 620.

5. Under Article 22, crime victims may apply to the Board for compensation. The Board then determines whether an award should be granted and what should be paid. Executive Law Section 631.

6. The Board, in conjunction with its compensation program, has certain subrogation claims and assignment rights arising from suits involving a victim who was awarded financial assistance by the Board. Executive Law Section 634.

7. The Board is also charged with the enforcement and administration of Section 632-a, commonly referred to as the "Son of Sam" Law.

8. Under Section 632-a(1), every person or entity who contracts with any person accused or convicted of a crime in New York State, as defined in Section 632-a(10)(b), with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of

any kind or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, must submit a copy of such contract to the Board, and pay over to the Board any moneys owing to the accused or convicted person. The Board must deposit such moneys in an escrow account for the benefit of and payable to any victim (or the victim's legal representative) of the accused or convicted person's crime. Once the moneys are escrowed the victim must bring a civil action and recover a money judgment for damages against the criminal before he can claim on the moneys held in escrow. If and when the victim obtains a civil court judgment the Board must satisfy the judgment with the funds escrowed.

9. The Son of Sam Law creates a new in rem cause of action in that it allows a victim to bring an action in a court of competent jurisdiction within five years of the establishment of an escrow account. After weighing the psychological and financial costs against the negligible assets of their often judgment proof assailants, many victims will choose not to commence a civil action based upon the acts constituting the crime within the applicable short statute of limitations because of its economic infeasibility. Section 632-a thereby provides a victim with a reasonable period of time, to seek civil redress once his assailant has acquired assets from which a victim's judgment can be satisfied.

10. Pursuant to Executive Law Section 632-a(4), upon a showing by any convicted person that five years have elapsed from the establishment of such escrow account and further that no actions are pending against such convicted person to recover moneys held pursuant to Executive Law Section 632-a, the Board is required to pay over any moneys in the escrow account to such person or his legal representative.

11. Priority of claims on moneys in the escrow account is established by Executive Law Section 632-a(11) and is as follows:

(a) Payments ordered by the Board or a court pursuant to Section 632-a(8);

(b) Subrogation claims of the State pursuant to Section 634 in an amount not exceeding one-half of the net amount of the civil judgment obtained by a victim which is payable directly to the victim from the escrow account;

(c) Civil judgments of the victims of the crime;

(d) Other judgment creditors or persons claiming moneys through the person accused or convicted of a crime who present lawful claims, including state or local government tax authorities;

(e) The person accused or convicted of the crime.

12. The priorities of claims established by Section 632-a(8) again recognizes the legislative intent of this statute to protect the criminal's victim by ensuring that the victim will stand ahead of the judgment creditors or other persons claiming through the convicted person, and is a realistic recognition that, but for the crime, funds may not be available against which to levy. Under the priorities set forth in Section 632-a(11) it is the representatives of the convicted person who aided in the production of the moneys (*i.e.*, literary agents) who stand first in line to obtain payment from the escrow account. Second in line to claim moneys in the escrow account is the Board in cases where it has provided financial assistance to a victim who later obtains a civil judgment. The State is subrogated to the victim's rights against the criminal and when a civil judgment is obtained by the victim, a portion of the moneys paid out by the State are returned to the State so that they are available to assist other crime victims. Without the Son of Sam Law, the State would merely stand in line with other creditors of the criminal in attempting to retrieve moneys due it.

13. In order to carry out its statutorily mandated duties as set forth in Section 632-a, the Board has adopted rules and regulations contained in Part 526 of Title 9 of the New York Codes, Rules and Regulations. See Exhibit "A" attached hereto. Under these Board rules (9 NYCRR 526.1), the Board Chair has a duty "upon receipt of information concerning a transaction which may be subject to the provisions of Section 632-a of the Executive Law," to "promptly have conducted an investigation to determine whether the proposed contract or other matter falls within the provisions of Section 632-a of the Executive Law." Upon completion of such an investigation and review of the specific language of the contract, the Board then issues a written Proposed Determination and Order with regard to the contract. The Proposed Determination and Order becomes final thirty (30) days after service if no objections are raised by an

interested party. If objections are raised, hearings are held and a Final Determination and Order is thereafter issued.

14. The statute and regulations of the Board provide ample means by which a publisher may obtain a determination from the Board regarding the applicability of Section 632-a to a particular contract. Those procedures include a request for a declaratory ruling (9 NYCRR 525.19) by which a publisher may obtain an binding ruling based upon an actual or hypothetical set of facts, a request for an advisory opinion of Counsel based upon a stipulated set of facts or circumstances, or a request for a formal Proposed Determination and Order based on submission of an actual contract and related information (9 NYCRR 526.1).

BACKGROUND

The following facts are taken from information contained in the Board's file in this matter.

15. In 1981, Jean Harris was convicted of Second Degree Murder arising out of the killing of Dr. Herman Tarnower at his home in Westchester County, New York. She is presently serving a term of fifteen (15) years to life at Bedford Hills Correctional Facility for that crime.

16. Macmillan, Inc. is a for-profit corporation doing business in New York State with offices located in New York City and is in the business of publishing books.

17. The Lantz Office is a literary and talent agency with offices located in New York City.

18. On March 19, 1985, Macmillan, Inc. and Jean Harris entered into a Contract known as a publishing agreement (hereinafter the "Contract") a copy of which is annexed hereto as Exhibit "B".

19. Under the terms of the Contract, Jean Harris (called the "Author" in the Contract) sells to Macmillan, Inc. the exclusive publishing rights to a work provisionally entitled *JEAN HARRIS: Autobiographical Reflections*, to be authored by Ms. Harris.

20. The Contract appoints The Lantz Office as the sole and exclusive agent for Jean Harris with respect to all rights under the Contract and authorizes the payment to The Lantz Office of a 10% commission of all moneys due Jean Harris under the Contract. See Supplementary Page One of the Contract, sub-paragraph (f).

21. The Contract further provides for the payment by Macmillan, Inc. to Jean Harris of an advance of One Hundred Thousand Dollars ($100,000), with payment of Fifty Thousand Dollars ($50,000) to be paid at the signing of the Contract and Fifty Thousand Dollars ($50,000) upon delivery of a manuscript to Macmillan, Inc. In addition the Contract provides for royalties to be paid to Jean Harris based upon the number of copies of the book sold. See the Contract at Paragraph I.

22. On or about March 19, 1985, the first installment of the advance under the Contract of $50,000 was paid by Macmillan, Inc. to Jean Harris through The Lantz Office which retained $5,000 as its commission.

23. In early September, 1985, a manuscript by Jean Harris was delivered to Macmillan, Inc. pursuant to the Contract. The original deadline of June 1st, 1985 called for in the Contract had been extended by Macmillan, Inc.

24. The Board first learned of the existence of the Contract in early February, 1986, based on press reports originating from the Macmillan, Inc. pre-publication publicity department which characterized the book by Jean Harris, now titled *Stranger in Two Worlds* as "the crime of the century - by a woman convicted of committing it." A copy of the press reports appearing on February 9, 1986 is annexed hereto as Exhibit "C".

25. On February 10th, 1986, the Board by its Counsel sent a certified letter to Macmillan, Inc. requesting that a copy of the Contract and certain other information be turned over to the Board pursuant to Section 632-a. A copy of such letter is annexed as Exhibit "D".

26. On February 13th, 1986, the Board received a letter from Macmillan, Inc. dated February 11, 1986, signed by Jeffrey S. Goldstein, Publishing Counsel, which enclosed a copy of the Contract annexed hereto as Exhibit "B". Macmillan, Inc. admits that it was aware of Executive

Law Section 632-a when it entered into the Contract with Jean Harris on March 19th, 1985, and states that it did not turn over a copy of the Contract to the Board or pay the advance due Jean Harris to the Board as provided by Executive Law Section 632-a(1), because it believed that the book to be produced by Jean Harris would be about "the plight of children with mothers behind bars" and would not contain a "re-enactment" of the crime for which Jean Harris was convicted or the "expression" of her "thoughts, feelings, opinions or emotions regarding such crime." See copy of letter of Jeffrey Goldstein dated February 11, 1986 annexed hereto as Exhibit "E".

27. By letter of Counsel dated February 14, 1986, the Board requested of Macmillan, Inc. a copy of the book prepared by Jean Harris under the Contract. A copy of such letter is annexed hereto as "F".

28. By certified letter of Counsel dated February 20th, 1986, the Board also requested The Lantz Office to turn over copies of any contracts with Jean Harris, a copy of any work produced under such contract and certain other information pursuant to Executive Law Section 632-a. A copy of such letter is annexed hereto as Exhibit "G".

29. The Lantz Office by letter of its attorney, Barry Lee Cohen, Esq., dated March 6, 1986, stated that its entire contractual agreement is contained in the Contract, a copy of which is annexed hereto as Exhibit "B", and further stated that it received $50,000 from Macmillan, Inc. under the Contract, paid $45,000 to Jean Harris and retained $5,000 as its commission. A copy of said letter is annexed hereto as Exhibit "H".

30. Macmillan, Inc. by letter dated March 6, 1986, signed by Jan Friedman Constantine, Associate General Counsel, declined to turn over a copy of the manuscript of the Jean Harris book until its publication date on the grounds that it feared premature release of the manuscript material could permit another competing publication to "scoop" the material contained in the manuscript. A copy of this letter is annexed hereto as Exhibit "I". After issuance of a Subpoena Duces Tecum by the Board on May 1st, 1986, for said manuscript, the filing of a Motion to Quash said subpoena by Macmillan, Inc. and the entry of a Stipulation of Settlement by the Board and Macmillan, Inc., on June 25, 1986 the Board finally received from Macmillan, Inc. a complimentary copy of the book by Jean

Harris. This work entitled *Stranger in Two Worlds* was published by Macmillan, Inc. in June, 1986.

31. By letter dated May 21 and received May 30, 1986, Leon Friedman, Esq., an attorney for Jean Harris, advised the Board that he was holding no money due or owing to Jean Harris or any assignee of hers, but that he had organized a not-for-profit corporation called "Children of Bedford, Inc." and that Jean Harris had instructed him to prepare a formal assignment to said corporation of the $45,000 second advance due Jean Harris under the Contract upon submission of a satisfactory manuscript. A copy of the letter is annexed hereto as Exhibit "J".

32. The certificate of incorporation of Children of Bedford, Inc. lists David Harris, son of Jean Harris, as its only officer and first listed director. James Harris, another son of Jean Harris, is also listed as a director. A copy of the certificate of incorporation is attached hereto as Exhibit "K".

33. The Estate of Herman Tarnower by its attorneys Sirlin, Sirlin & Nolletti has advised the Board in a letter dated February 20, 1986 that it represents the family of the victim in this case and that the victim's family will be claiming any monies escrowed by the Board under Section 632-a. A copy of the letter is annexed hereto as Exhibit "L".

34. The Board issued a Proposed Determination and Order in this matter on July 29, 1986 finding that the Contract between Jean Harris and Macmillan, Inc. dated March 19, 1985, was of the type regulated by Executive Law Section 632-a in that it was for the autobiography of a woman nationally famous only because of her crime; that a copy of the Contract or proposed contract should have been turned over to the Board in 1985 or at least prior to the payment of the fifty thousand dollar advance to Jean Harris; that Jean Harris was familiar with the Board's Section 632-a procedures having successfully petitioned the Board in 1982 for a ruling exempting the moneys she received from *McCall's Magazine* for an article solely on prison life from being escrowed under the statute. [See Determination and Order, dated September 10, 1982, *In the Matter of A Contract Between Jean Harris and McCall Publishing Company* attached as Exhibit "M"]; that in the Board's opinion no credible evidence had been submitted by Macmillan, Inc. to support its contention that it believed the

book for which it had contracted would not in any way involve the crime for which Jean Harris was convicted; that the book contained both Jean Harris' version of a re-enactment of the crime for which she was convicted as well as expression of Jean Harris' thoughts, feelings, opinions, and emotions regarding the crime; that The Lantz Office as an agent of Jean Harris was a representative under Executive Law Sections 621(6) and 632-a and could make an application to the Board for payment of necessary expenses for the production of moneys paid into the escrow account to be established by the Board in this case; that with respect to the announced intention of Jean Harris to assign all or part of her advance and royalties under the Contract to a not-for-profit corporation which had been established by her attorney, Section 632-a(9) specifically and clearly nullified any such assignment as against the public policy of this State; and that any assignee of Jean Harris was deemed a "representative" of the person convicted of the crime pursuant to Executive Law Section 621(6) and therefore as a representative of Jean Harris, Children of Bedford, Inc. is subject to the same provisions of Executive Law Section 632-a with regard to all moneys received as is Jean Harris.

Accordingly, the Board ordered, *inter alia*:

(a) that all monies paid or payable to Jean Harris or her representatives under the Contract must be turned over to the Board to be held in escrow for the benefit of the victims of the crime for which Jean Harris was convicted.

(b) that in the event Jean Harris fails to turn over to the Board moneys paid to her in the amount of $45,000.00 plus interest within thirty (30) days after issuance of a Final Determination and Order of the Board in this matter, that Macmillan, Inc. shall turn over to the Board the total of moneys it wrongfully distributed to Jean Harris through The Lantz Office in the amount of at least Forty-five Thousand Dollars ($45,000) plus legal interest from March 19, 1985;

(c) that Macmillan, Inc. turn over to the Board forthwith the second advance now due to be paid to Jean Harris, to with the sum of Fifty Thousand Dollars ($50,000) as well as any and all future royalties or other moneys that would otherwise be payable to Jean Harris or her representatives under the Contract;

(d) that The Lantz Office pay over to the Board to be escrowed pursuant to Executive Law §632-a the sum of Five Thousand ($5,000), received from Macmillan, Inc., as well as any other past or future moneys received or to be received from the Contract or any successor or modification to the Contract;

(e) that Macmillan, Inc. and The Lantz Office submit a quarterly and cumulative accounting of all moneys paid and payable to Jean Harris, her representatives or assigns, derived from the work *Stranger in Two Worlds*. A copy of the Proposed Determination and Order is affixed hereto as Exhibit "N".

35. Objections to the Proposed Determination and Order were filed by Leon Friedman, on his own behalf and as attorney for Children of Bedford, Inc.; Jan F. Constantine, Associate General Counsel for Macmillan, Inc.; and The Lantz Office by its attorney Barry Lee Cohen. A copy of the Statements of Matters to be Heard at the hearing is annexed as Exhibit "O".

36. Subsequent to the issuance of the Proposed Determination and Order, hearings were then held in the Albany Office of the Board before George L. Grobe, Jr., Board Member and designated Hearing Officer, on October 2, 1986, November 14, 1986, February 10, 1987 and June 3, 1987 to take testimony in connection with the interested parties' objections to said Proposed Determination and Order.

37. On September 4, 1987 Mr. Grobe issued his report pursuant to 9 NYCRR 526.1. A copy of the report is affixed hereto as Exhibit "P". On September 28, 1987 at a duly convened Board meeting, Board Members Fischetti, McGrath, and Petromelis, constituting a Board Quorum, unanimously adopted the report prepared by Mr. Grobe.

38. In its Final Determination and Order dated October 26, 1987 the Board affirmed and adopted its Proposed Determination and Order dated July 28, 1986 with the following modifications:

(a) After review of The Lantz Office's application to retain its literary fees pursuant to Executive Law Section 632-a (8) the Board determined that The Lantz Office was entitled to its commission equal to ten (10%) percent of all moneys payable to Jean Harris or her

representatives or assigns by reason of her contract with Macmillan, Inc. for the production of the work *Stranger in Two Worlds* and arising out of any other publication of the work or the sale, lease, license or other disposition, or rights therein or thereto; except that such commission shall be twenty (20%) percent in respect to the sale, lease, license or other disposition of foreign language rights.

(b) In recognition of the common trade practice of issuing semi-annual accounting reports, the Board was of the opinion that that portion of the Proposed Determination and Order should be modified to permit a semi-annual accounting. A copy of the Final Determination and Order is affixed hereto as Exhibit "Q".

Response to Specific Argument of Petitioners

39. Petitioners contend that the Son of Sam Law deters the creation of and publication of books about crime. Section 632-a was not intended to and does not deter the creation and publication of books about crime written by or with the assistance of persons who admit to or are convicted of a crime.

40. A reading of the plain terms of the statute shows it does not contain any prohibitions against the creation or publication of books about crime. In fact, it does not prevent any publisher from providing the convicted person with financial remuneration for his crime story. Nor does the statute prohibit compensation to non-criminal authors or literary agents. The statute merely requires that financial remuneration due the criminal be escrowed for a five year period so that a victim of criminal acts has a source against which he can claim if and when a civil judgment against the criminal is obtained.

41. Indeed, the Board is presently working on ten other cases in which it has determined that Section 632-a applies. These cases, which are at various administrative stages, include three contracts with Jack Henry Abbott, a convicted murderer, in which the Board has issued Final Determination and Orders and established three escrow accounts; a contract for a magazine article written with the assistance of Mark David Chapman, convicted murderer of John Lennon, in which a Proposed Determination and Order has been issued and a hearing pending; a contract for a book

written with the assistance of Michelle Sindona, convicted of 65 counts of fraud, conspiracy, making false bank statements and perjury, in which a Proposed Determination and Order has been issued; and a contract involving John Wojtowitz, convicted bank robber upon whom the movie "Dog Day Afternoon" is based, in which one escrow account was established and depleted by victim judgments and creditors and a second escrow account established in May 1987. The Board also is investigating approximately ten other cases in which a convicted person or his representative may have received monies for his crime story.

42. Petitioners contend that due process was denied because they were not advised which passages of the book between pages 123 and 192 specifically violated Executive Law Section 632-a. The Board held, however, that the language of the contract involving the book came within the terms of the statute. We then received the book only to make certain that it comports with the contract.

43. Contrary to petitioners' argument, fair notice does not require the Board to specify which particular words or passages of the book support the language of the contract. It should be noted, however, that the Board does not agree with petitioners that trial transcripts alone cannot implicate the statute. In Ms. Harris' book, however, the Board concluded that the overall discussion of the crime, including the transcripts, in pages 123 - 192 made it clear that the contract between Mcmillan, Inc. and Ms. Harris came within the purview of Section 632-a.

WHEREFORE, your deponent respectfully prays that petition be denied in all respects.

Dated: Albany, New York
October 27, 1988

/s/
Lorraine Felegy, Counsel

SUBSCRIPTION OMITTED

SUPREME COURT, U.S.
FILED
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OFFICE OF THE CLERK

(7)

No. 90-1059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

May New York, by its "Son of Sam law," prohibit publishers from paying advances and royalties for the authorship of books about crimes, to persons accused or convicted of those crimes or who admit those crimes in their books, and require instead that such payments be made to the New York Crime Victims Board to compensate victims of the crimes, when the law (a) prohibits payment only for speech of certain specified content, leaving speech having other content outside its scope, (b) makes provision to compensate crime victims only from payments for speech, leaving crime victims to their ordinary remedies to reach all other assets of criminal tortfeasors, and (c) has in fact deterred the creation and publication of speech?

RULE 29.1 NOTICE

The notice required by Rule 29.1 is set forth in the Petition for Certiorari at 1 n.1.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990
No. 90-1059

SIMON & SCHUSTER, INC.,

Petitioner,

— v. —

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (1a-26a) is reported at 916 F.2d 777 (2d Cir. 1990).[1] The decision of the District Court (27a-45a) is reported at 724 F. Supp. 170 (S.D.N.Y. 1989). The

1 "__a" refers to the Appendix to the Petition for Certiorari. "JA __" refers to the Joint Appendix. "CA App. __" refers to the Appendix filed in the Second Circuit, which contained the entire pertinent Record.

decision of the New York Crime Victims Board (49a-53a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (54a) was entered on October 3, 1990. The petition for certiorari was timely filed on December 28, 1990, and the writ was granted on February 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

New York Executive Law Section 632-a (McKinney 1982 and Supp. 1990), commonly known as the Son of Sam law, is reproduced in the Appendix to the Petition for Certiorari at 55a-58a.

STATEMENT OF THE CASE

This case arises out of Simon & Schuster's publication of the best-selling book *Wiseguy: Life In A Mafia Family*, by Nicholas Pileggi. Widely acclaimed as a skilled, revealing, and debunking book on organized crime with more than a million copies in print (JA 20), *Wiseguy* was subsequently made into an equally acclaimed film by Martin Scorsese, *GoodFellas*. The New York Crime Victims Board ("the Board") determined that New York Executive Law Section 632-a prohibited Simon & Schuster from making payments to the principal source for the information in *Wiseguy*, Henry Hill. Absent those payments, the record shows without

contradiction, the book would never have been written. The Court of Appeals, in an opinion by Judge Miner joined in by Judge Walker, held that section 632-a burdens freedom of speech sufficiently to require strict scrutiny under the First Amendment, but nonetheless upheld the constitutionality of the statute. Judge Newman dissented.

1. New York Executive Law Section 632-a targets only monies paid or earned in the exercise of the rights of free speech and free press. It applies to every contract made with a person "accused" or "convicted" of a crime for the "expression" of the "accused or convicted person's thoughts, feelings, opinions, or emotions regarding such crime" or for the "reenactment" of the crime "by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, [or] live entertainment of any kind. . . ." Section 632-a (1). The law prohibits payment to the accused or convicted person for such expression for at least five years. Section 632-a (4).

The law requires that a publisher[2] who enters into such a contract must provide a copy of the contract to the Board and pay over to the Board any royalties or other payments due under it. The Board places such monies in an escrow fund and is obliged to hold them for at least five years, and then to pay them to any victim who has commenced an ordinary civil tort action and recovered a judgment. The law thus functions as a special attachment statute limited to payments for speech about crime. To the extent that escrowed funds remain after satisfying any judgments obtained by crime victims, they are used to satisfy state

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2 For convenience, we will refer here and below to "publishers," "authors," and "books," and the references should be understood as shorthand for all the First Amendment speakers and works to which section 632-a applies.

and local tax authorities and the others benefitted by the statute specified in section 632-a (11)(b) and (d), and any unused funds are then paid over to the accused or convicted person who earned them. Section 632-a (4).

The statute is designed to have a broad reach. It applies to books dealing principally with other subjects but that have casual or incidental references to their authors' crimes.[3] Its definition of "convicted" persons includes those (like Henry Hill here) who are deemed by the Board to have "voluntarily and intelligently admitted," *in their books*, "the commission of a crime for which such person is not prosecuted." Section 632-a (10)(b).[4] The statute applies to all crimes, not only crimes of violence or felonies. It encompasses federal as well as state crimes,[5] and applies retroactively to crimes committed before its enactment.[6] It benefits even those victims against whom the statute of limitations has run, providing for a revival of claims whenever a criminal writes a book mentioning his or her crime, thus earning a royalty. Section

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3 *See Children of Bedford, Inc. v. Petromelis*, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989), *aff'd without op.*, 556 N.Y.S.2d. 483 (1st Dep't 1990), *appeal pending* (Ct. of Appeals).

4 References below to "accused" or "convicted" persons, or to "criminals," should therefore be understood to include those never formally accused or convicted but who write about their "crimes" in books.

5 *St. Martin's Press v. Zweibel*, No. 12273/89, N.Y.L.J., at 25, col. 1 (Sup. Ct. N.Y. Co. Feb. 26, 1990) (application to Foster Winans for federal securities fraud).

6 *St. Martin's Press v. Zweibel, supra; In re Johnsen (Berkowitz)*, 430 N.Y.S.2d 904 (Sup. Ct. Kings Co. 1979).

632-a (7). The Board applies the statute even where it cannot identify or foresee the existence of any victim of the crime.[7]

"[C]onceived in haste, written in haste, and declared under the cry of the public for the Legislature to exact retribution," *In re Johnsen (Berkowitz)*, 430 N.Y.S.2d 904, 906 (Sup. Ct. Kings Co. 1979), section 632-a was enacted a week after its introduction in the state legislature, amid reports (never confirmed) that members of the media were offering to pay the as-yet unidentified and unapprehended "Son of Sam" killer for the exclusive rights to his story. The sponsor of the bill found it "abhorrent to one's sense of justice and decency that an individual, such as [Son of Sam] . . . can expect to receive large sums of money *for his story*." JA 102 (statement of State Senator Emmanuel Gold, emphasis added).

Four aspects of Section 632-a are particularly noteworthy.

First, the law reaches only payments for expression. Section 632-a (1). Persons accused or convicted of crimes may be paid for non-expressive activities. They may receive and retain gifts, inheritances and income, earned or unearned, from any source. Crime victims are left to their ordinary remedies regarding such assets.

Second, the law prohibits payment only for expression of specified content on a specified subject: "thoughts, feelings, opinions, or emotions" concerning a crime or a "reenactment" of a crime which the accused or convicted person is said to have committed. *Id.* Payments for any other speech — for example, payments to convicted killer Jean Harris for a work about prison

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7 *See In re Bernhard Goetz*, slip op. at 5, 6 (New York State Crime Victims Board, Mar. 17, 1988) (whether law applies "must be determined . . . without consideration of whether any victim exists"). (A copy of this decision has been lodged with the Clerk.)

conditions, or to Henry Hill for a work about his experience in the witness protection program, would not be prohibited. Similarly, while the sales of a novel by John Ehrlichman would likely be enhanced by his Watergate-earned notoriety, the statute would not apply to any royalties he thereby earns.

Third, the funds attached by the statute are made available not just to crime victims, but to all other judgment creditors and others as well (section 632-a (11)) — a preference that none of the state's asserted interests begins to explain.

Last, the extension or revival of the statute of limitations, section 632-a (7), ensures that the speech-inhibiting effects of the statute will endure throughout the lifetime of any criminal who would write about his or her experiences.

The statutory scheme raises the question whether New York's motivation to enact the statute in fact related to victims' compensation, or instead was grounded in hostility to the speech that falls within the statute's defined scope. Further evidence of such hostility, including New York's repeated assertions that the speech to which the statute applies is itself "injurious" to crime victims and exploitative of them, is discussed below.

2. Richard E. Snyder, Simon & Schuster's President and Publisher, and Michael Korda, its editor-in-chief, conceived the idea of publishing a book about Henry Hill, an organized crime foot-soldier cooperating with federal and state prosecutors under the Federal Witness Protection Program. They envisioned that the book would show what working for the mob actually entailed, and would shatter the romanticized picture in books like *The Godfather*. They asked Nicholas Pileggi, an experienced journalist who had previously written articles on organized crime for *The New York Times Magazine*, *New York Magazine*, and *Reader's Digest*, to write the book. Pileggi agreed after consulting with law

enforcement authorities about Hill's reliability and his capability of cooperating to the extent necessary. 6-7a, 28a; JA 18-19, 25-26.

Hill was willing to cooperate only if he were compensated for the hundreds of hours Pileggi would require him to devote to the project. As the majority below noted, "[t]here seems to be no question that Hill would not have agreed to participate in the project without the assurance he would be paid." 6a. Compensating such primary sources is standard publishing industry practice (JA 14, 20, 26-27), and so Simon & Schuster's agreement to acquire and publish *Wiseguy* was made with both Pileggi and Hill and provided for payments to both. There was no dispute in the record, and the Court of Appeals noted, that the book could not and would not have been written without Hill's paid cooperation. 6a, 26a; JA 19, 26.

In accordance with standard industry practice, Hill was paid an advance against royalties when he signed the publishing agreement, and would earn additional royalties based on sales as soon as the advance was recouped. In return, Pileggi received Hill's cooperation on a virtually daily basis for more than two years. Pileggi's notes of hundreds of hours of conversations with Hill — the activities for which Hill was paid — occupy more than six linear feet of files, and form the raw material on which *Wiseguy* (and later *GoodFellas*) was based. 6a; JA 27.

Wiseguy was widely praised as an important contribution to the literature of criminal behavior, and was favorably reviewed by George Will, Jonathan Yardley, *The New Republic*, and the *Kansas City Star*, among many others. JA 19-20, CA App. 172-82. Typical of the response accorded *Wiseguy* was a review by Professor G. Robert Blakey of Notre Dame Law School, principal draftsman of the RICO statute, who wrote that

> Pileggi, fortunately, had the cooperation of Hill and his wife, Karen, so his story reflects a substantial amount of insight into the personalities of the protagonist . . . . *Wiseguy* is . . . a welcome addition to the popular literature on organized crime, and, fortunately, it does not unnecessarily contribute to the sensationalism, glamorizing or romanticizing of organized crime or the mob.

N.Y.L.J., Apr. 15, 1988, at 2, col. 3. Jimmy Breslin, a newspaper columnist in New York City, called *Wiseguy* "the best book on crime in America ever written." JA 19, CA App. 173.[8]

3. The Board commenced its inquiry by delivery of letters to Simon & Schuster and author Pileggi which sought, *inter alia*, copies of "all . . . contracts or agreements" either Simon & Schuster or Pileggi may have entered into with any person "who has been accused or convicted of a crime," the name of any such person, a "description, location, and dates of crimes committed," and any amounts paid to such person. JA 86-89. These sweeping demands required Simon & Schuster to review all of its thousands of contracts, and sought to conscript Simon & Schuster into laying bare any information it might have on the past criminal activity of

8 The Court can take judicial notice of the fact that *GoodFellas*, based on *Wiseguy* (and therefore dependent on the payments at issue here), was itself highly acclaimed. Among its many other awards, *GoodFellas* was chosen best film of 1990 by the Los Angeles Film Critics Association, the New York Film Critics Circle, the National Society of Film Critics, the National Film Board of Review, the Chicago Film Critics, the American Film Magazine Poll, and the British Academy of Film and Television, and was nominated as best film by the Academy of Motion Picture Arts and Sciences.

any of its authors or primary sources, and were not limited to *Wiseguy*. *Id.*

After administrative proceedings, the Board found in May 1987 that Simon & Schuster had violated section 632-a by failing to turn over to the Board the publishing agreement for *Wiseguy* when it was signed in September 1981, and by paying Hill $96,250 as his share of the advance. JA 52-53.[9] The Board ordered Simon & Schuster to turn over to it any additional royalties payable to Hill, and a penalty equal to the $96,250 previously paid Hill unless Hill promptly paid that sum to the Board. JA 53-54.

The Board based its administrative determination squarely on *Wiseguy*'s content. Hill was deemed subject to the statute because *Wiseguy* "contains . . . his admission to involvement in . . . crimes" (JA 53), and *Wiseguy* was deemed subject to the statute because it contains Hill's "thoughts, feelings, opinions and emotions regarding [those] crime[s]." *Id.*[10]

4. In August 1987, Simon & Schuster brought this action under 42 U.S.C. § 1983 against the members of the Board, seeking declaratory and injunctive relief invalidating the Son of Sam law on its face and as applied to the payments due Hill for helping to create *Wiseguy*.

9 The document initially labelled "Proposed Determination and Order" subsequently became the Board's final Order by its terms. JA 49; *see* JA 15.

10 Henry Hill was never prosecuted for the principal events written about in *Wiseguy* because he was immunized by state and federal prosecutors and was cooperating with them under the Federal Witness Protection Program. 6-7a; JA 18, 25.

Simon & Schuster moved for summary judgment, relying on affidavits from authors, publishers, editors, and a leading literary agent establishing that the statute's prohibition on payments for certain speech had and would continue to have "the inevitable effect of reducing the total quantum of speech." *Meyer v. Grant*, 486 U.S. 414, 423 (1988). *See* JA 18-47.

Michael Korda, Simon & Schuster's editor-in-chief, and Sterling Lord, a leading literary agent who represented Pileggi and Hill, explained the vital and indispensable role that pre-publication advances have in publishing. JA 20-22, 31-33. As Korda noted (JA 20),

> By forbidding payment to certain writers and sources, the statute necessarily results in some books not being published. In all my years in publishing, I have never seen an author, and rarely a primary source (one who will have to spend substantial time providing information to an author), who would be willing to undertake the necessary tasks without an enforceable promise that he will be paid, and paid promptly. Most authors and primary sources do not have the financial resources to write without promise of recompense; the hours they spend writing rather than at other work are hours for which they need to be remunerated. Yet the statute precludes us from promising to compensate certain authors or sources at all, and prohibits us from paying them advances or royalties on the standard timely basis — making it as a practical matter impossible to conclude an agreement with an author or source.

Pileggi and Korda both explained that timely paying Hill was essential to the creation of *Wiseguy*. JA 19, 26.

The affidavits showed how the law's prohibition against paying primary sources and authors has a significant impact on what is and is not written and published. Pileggi has foregone at least three specific book projects that he would have pursued but for his concern over Son of Sam law interference. JA 27-28. Simon & Schuster too has in fact rejected certain book projects because the law would apply. JA 21. G.P. Putnam's Sons has edited out a discussion of a youthful crime from an autobiography of a celebrity author, in order to avoid the snare of a Son of Sam law. JA 47. Literary agent Sterling Lord recalled that portions of a manuscript he once sold, a frank autobiographical work about a life of burglary (in 1953), would have had to have been deleted in order to publish the book had the Son of Sam law been in effect. JA 32.

Korda's affidavit also included this example of the dilemmas posed by the Son of Sam law: Simon & Schuster was then (1987) grooming Jesse Jackson's autobiography for publication. Korda's interest in publishing the work arose "not from any past crime to be exploited for profit, but from the intrinsic interest of the larger life-story the author (here, a candidate for President of the United States) has to tell." JA 21. The first chapter of Jackson's manuscript, however, tells about Jackson's 1963 arrest in North Carolina for trespassing and resisting arrest while attempting to be served at a Woolworth's lunch counter. JA 22.

Had that "crime" occurred in New York rather than North Carolina, what would Korda and Jackson do? Pay the advances and royalties due Jackson to the New York Crime Victims Board? Or delete the material that would trigger the law, offering the public a somewhat sanitized version of Jackson's history? *Id.*

Other publishers' affidavits cited examples of works that would have been subject to the law, and thus possibly bowdlerized or not published, had the Son of Sam law applied at the time and place of

publication, including works by Martin Luther King, Jr., Malcolm X, Lenny Bruce, Whitaker Chambers, Armand Hammer, and Abbie Hoffman. JA 21-22, 32, 34-35, 43, 45-46, and CA App. 71.

On October 24, 1989, the District Court upheld the law, on cross motions for summary judgment, as an "incidental" limitation on speech. The Court declined to apply strict scrutiny and distinguished *Meyer v. Grant*, 486 U.S. 414 (1988), which held that direct restrictions on payment for speech are equivalent to direct restrictions on speech and are therefore subject to strict scrutiny, as applying only to political speech. 38a.

5. A split panel of the Court of Appeals affirmed the judgment, but not the reasoning, of the District Court. 1a-26a.

The Court unanimously disagreed with the District Court on the proper level of scrutiny, all panel members holding that the statute imposes a direct burden on free expression requiring the application of strict scrutiny. 10-13a, 19a. Three independent reasons were given: the statute's content-based application, its "singl[ing] out the media for differential treatment," and its "effect of excluding from circulation the expression of criminals who would write about their crimes. . . ." 12-13a.

The majority nonetheless upheld the statute, finding it "narrowly tailored to [serve] the State's [compelling] interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization." 15a.

Judge Newman dissented on the ground that the Board had not justified the suspect distinctions drawn by the statute (24a-25a):

> [W]hen New York, understandably outraged by the prospect that a criminal might profit from a book about his crime, tries to enact a victim restitution statute that applies only to protected speech, rather than all income-producing activity, and, then, only to speech of specified content, rather than all speech, it encounters First Amendment obstacles that in my judgment are insuperable.

The dissent also found the statute ill-suited to achieve its objective, noting that the five escrow accounts established in the statute's first eleven years (three for the same victim) were "more than offset by the royalties that would have been earned on books that were not published because of this statute." 25a.[11]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly held that payments necessary to make and disseminate speech can no more be restricted than the speech itself. The Court has recently and unanimously reaffirmed that principle. *Meyer v. Grant*, 486 U.S. 414, 423 (1988).

Simon & Schuster saw Henry Hill's willingness to cooperate with federal prosecutors as the opportunity to create a book that would help reveal the true nature of organized crime. Simon & Schuster had to pay advances and royalties to Hill in order make its point. Like the speech in *Wiseguy* itself, the right to make the payments essential to *Wiseguy*'s creation is constitutionally protected.

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11 From the enactment of the statute in 1977 to October 1988, the Board had actually paid escrowed funds to the victims of precisely one criminal. JA 137-38. According to a recent *New York Times* article for which Board member Petromelis was interviewed, no additional victims have been assisted since that time. *The New York Times*, Feb. 20, 1991, at B8. According to the article, Board member Petromelis characterized the funds produced by section 632-a as "small-time stuff," and noted that by contrast the Board has distributed to crime victims more than $12 million obtained under auspices other than section 632-a.

As this Court held in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978), "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." By prohibiting publishers contracting with writers or sources who have been accused or convicted of crimes, or who may "admit" crimes in their proposed books, from paying timely compensation with respect to any expression concerning such crimes, section 632-a, in the words of the majority below, has "the effect of excluding from circulation the expression of criminals who would write about their crimes" if the agreed-upon payment could be made. 12a. This "exclusion" of speech is intolerable under the speech and press clauses of the First Amendment.

1. The restriction on timely contractual payments of advances and royalties on which the creation and publication of books generally depends is presumptively violative of the First Amendment, and subject to exacting scrutiny, for three independent reasons.

First, as common sense, the record below, and the Court of Appeals' findings confirm, the payment restrictions directly burden speech by deterring the creation of speech subject to its terms, and are therefore subject to strict scrutiny under *Meyer, supra*, and *Buckley v. Valeo*, 424 U.S. 1, 15-20 (1976) (*per curiam*). Second, strict scrutiny is required because Section 632-a singles out expressive activity and the press. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). Third, strict scrutiny is also required because the payment restriction applies only to speech of specified subject matter and content and by specified speakers. *E.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *First Nat'l Bank v. Bellotti, supra*.

2. Section 632-a fails strict scrutiny. The Board has proven neither that the statute as a whole is necessary and narrowly tailored to serve compelling state interests, nor that there is any necessity for its content-based distinctions and its singling out of the press for special adverse treatment.

Section 632-a is grossly underinclusive with respect to the interest in victim compensation, because it aids only those crime victims whose crimes are written about by those who injured them.

Nor can section 632-a be justified by the interest in preventing criminals from profiting from or exploiting their crimes. Payments for *Wiseguy*, and payments generally for books subject to the Son of Sam law (had the law been in effect when they were written) such as, to take just two examples, Martin Luther King, Jr.'s *Where Do We Go From Here?* and *The Autobiography of Malcolm X*, are not under traditional understanding or any sensible definition the profit of crime, and could not be deemed so without depriving the people of speech that the First Amendment fully protects.

Moreover, because section 632-a applies to all of the compensation paid even for works principally devoted to subjects other than crime, the statute is impermissibly overinclusive with respect to the interest in ensuring that criminals not profit from crime. And by providing for the return of any payments to the "criminal" should no victim file a tort action and obtain a judgment within five years, the statute permits some criminals to "profit" and is thus underinclusive as well.

Finally, the statute cannot be justified by the wordplay of mixing the two independently insufficient interests together to create an interest in assuring "that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited." 15a. This so-called interest rests

at bottom on victim compensation, and fails to justify both the statute's failure to reach all the assets of criminal tortfeasors, rather than just assets from expression, and its suspect singling out of payments for expression on certain subjects. New York has an important interest "that funds [be] set aside" out of all a criminal's assets to be made available to satisfy judgments obtained by victims, but it has no good reason to advance that interest solely as to speech-related assets derived from speech of disfavored content.

ARGUMENT

I

THE DIRECT BURDENS SECTION 632-A IMPOSES ON SPEECH ARE SUBJECT TO STRICT SCRUTINY

Laws that directly burden expression,[12] that regulate on the basis of content or the identity of the speaker,[13] or that single out the media for differential and adverse treatment,[14] so impair free speech interests that they are presumptively invalid. Such laws are subject to "exacting scrutiny," *Meyer*, 486 U.S. at 420, or "strict scrutiny" as it has come to be known, and can be upheld only if the government successfully bears the burden of proving that the law

12 *E.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976). *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986).

13 *E.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

14 *E.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983).

is necessary and narrowly tailored to serve compelling governmental interests that cannot otherwise be achieved.

Section 632-a has not merely one, but three, of the defects that this Court has held trigger strict scrutiny, as the Second Circuit unanimously held:

- the restriction on payment for speech is a direct burden on speech that has the effect of reducing speech by some accused or convicted criminals who otherwise would write about their crimes;
- the restriction on payment applies only to payment for speech (*i.e.*, only to the media), and not to any other payments to or assets held by those subject to the law; and
- the restriction on payment applies only to speech of specified subject matter and content by specified speakers.

Because these aspects of section 632-a trigger strict scrutiny, the Board's contentions that strict scrutiny need not be applied because no speech is restricted at all, citing *Arcara*, 478 U.S. 697, or that only minimal scrutiny is required because any restriction is incidental, citing *United States v. O'Brien*, 391 U.S. 367 (1968), are without merit.

A. Section 632-a's Payment Restriction Directly Burdens Protected Speech and the Press and Has Deterred the Publication of Protected Speech

Statutory restrictions on expenditures for speech have the "inevitable effect of reducing the total quantum of speech." *Meyer*, 486 U.S. at 423. This Court has held seven times in the last fifteen years that restrictions on payments for speech are direct burdens on speech that are invalid unless proven to be necessary and narrowly

tailored to serve compelling governmental interests.[15] Those cases, in each of which the expenditure restriction was struck down, are controlling here, and require subjecting section 632-a to strict scrutiny.

Meyer v. Grant is illustrative. There, this Court unanimously held that a Colorado law that prohibited initiative proponents from paying petition circulators (but left them "free" to engage circulators without payment) constituted a direct burden on the First Amendment rights of the initiative proponents. 486 U.S. at 428. This Court rejected the argument that speech was not burdened because the law prohibited only payment and not the underlying speech. The Court described the burden on speech as "well-nigh" impossible to justify, and struck down the law. *Id.* at 423, 425. *See also Riley v. National Fed'n of the Blind*, 487 U.S. 781, 793-94 (1988) (recognizing that a speaker's uncertainty whether he will be paid "must necessarily chill speech in direct contravention of the First Amendment's dictates.")

Here, as in *Meyer* and *Riley*, the statutory prohibition on making payments deemed necessary for speech will predictably

15 *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) (payments to charitable solicitors); *Meyer*, 486 U.S. 414 (payments to petition circulators); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (contributions by political advocacy group); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (payments to charitable solicitors); *Village of Schaumburg v. Citizens For A Better Env't*, 444 U.S. 620 (1980) (payments by environmental group to solicitors); *First Nat'l Bank*, 435 U.S. 765 (expenditure supporting initiative); and *Buckley*, 424 U.S. at 15-20 (expenditures for political expression). *See also Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990) (applying strict scrutiny but upholding statute).

eliminate some speech that would otherwise take place, and as shown by the undisputed record has already done so.

No matter how willing, most people cannot devote hundreds of hours to books "without promise of recompense; the hours they spend writing rather than at other work are hours for which they need to be remunerated." JA 20; *see also* JA 21-22, 31-33. As the Second Circuit held, "[w]ithout a financial incentive . . . most would-be storytellers will decline to speak or write." 11a.

"Undisputed affidavits" below established, as Judge Newman noted, that section 632-a's prohibition on payments by publishers to authors and primary sources "has already led to decisions not to publish books of high public interest." 24a. *See* pp. 10-12, *supra*. The record proved without dispute that Son of Sam law restrictions have led to decisions not to write and not to publish certain works, and to self-censor discussion of events which books otherwise would have included, to avoid triggering the law. JA 20-22, 27-28, 32, 34-35, 43, 45-47, and CA App. 71.

That record cannot be dismissed as "conjectural" or "speculative." Plaintiff adduced specific examples of works that have not been published at all and of works that have been bowdlerized, as a result of the payment restrictions of Son of Sam laws,[16] as well as assessments of the law's harmful effect on incentives to write and publish by writers, editors, publishers, and literary agents whose judgments are probative and may not be summarily disregarded. *See, e.g.*, JA 26-28, 30-33, 34-35, 37-41, 42-43, 45-47. This Court has frequently relied on similar evidence

16 JA 21, 28, 47.

in holding that certain regulations will directly burden speech and therefore warrant strict scrutiny.[17]

This record fully supports what experience teaches and what our law confirms, that the incentive of economic gain is the engine that drives free expression. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985) ("[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas"); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (promise of personal gain "motivate[s] the creative activity of authors . . ."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . . ").[18] As this Court has observed, "[b]eing free to engage in

17 *See, e.g., Meyer*, 486 U.S. at 423 n.6 ("Paul Grant testified that compensation resulted in more people being 'able and willing' to circulate petitions. 2 Record 19-20. As he succinctly concluded: '[M]oney either enables people to forego leaving a job, or enables them to have a job.'"); *National Fed'n of the Blind v. Riley*, 635 F. Supp 256, 260 (E.D.N.C. 1986), *aff'd*, 817 F.2d 102 (4th Cir. 1987), *aff'd, Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988).

18 These cases echo H.L. Mencken's remark that "the impulse to create beauty is rather rare in literary men . . . far ahead of it comes the yearning to make money," Samuel Johnson's dictum that "no man but a blockhead ever wrote except for money," and Thomas Macauley's recognition that "[i]t is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated. . . ." *See* B. Stevenson, *Homebook of Quotations* at 2250 (Greenwich House) (10th ed. 1984), *quoting* Mencken, *Prejudices*, Fifth Series at 189 (A.A. Knopf 1926), and (continued...)

. . . expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline. . . ." *Buckley*, 424 U.S. at 19 n.18; *see also Meyer*, 486 U.S. at 423-24. The defenders of section 632-a must admit that its strictures cannot fail to deter speech.

B. Section 632-a Differentially Regulates Expressive Activity

Section 632-a is also subject to strict scrutiny under the rule that a regulation that "singles out the press" requires "a heavier burden of justification on the State" than does a generally applicable economic regulation, and is invalid unless "the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential" regulation. *Minneapolis Star*, 460 U.S. at 585-86. *See also Leathers v. Medlock*, Nos. 90-29, 90-38, 1991 U.S. LEXIS 2220 (April 16, 1991) (Genfed library, U.S. file) (reaffirming *Minneapolis Star*); *Arcara*, 478 U.S. at 704, 706-07 (requiring a "greater burden of justification" where "a statute . . . has the inevitable effect of singling out those engaged in expressive activity"); *Arkansas Writers' Project*, 481 U.S. at 228 (legislation "singling out the press . . . poses a particular danger of abuse by the State").

The rule requiring justification for differential regulation of the press averts troublesome inquiries into legislative motive, and deters legislation stemming from hostility to the press by requiring legislatures to subject other economic actors to the same burdens that are imposed on the press. *See, e.g., Minneapolis Star*, 460

18(...continued)
Boswell, *Life of Samuel Johnson* (1776); Macaulay, *Copyright* (1841 Speech in House of Commons), in 8 Works at 195, 197 (Trevelayan ed. 1879).

U.S. at 585 ("differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression"); *Carlin Comm., Inc. v. FCC*, 749 F.2d 113, 121 (2d Cir. 1984); *cf. Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

Because only those who contract to publish or create expression are subject to section 632-a's burdens, the law plainly singles out "those engaged in expressive activity" in precisely the way that *Minneapolis Star* and its progeny condemn, and is therefore subject to strict scrutiny for this reason as well. Section 632-a deprives only those engaged in expressive activity from receiving agreed-on payments for lawful activity, prohibits only the media from making payments for lawful activity, and subjects only the media's contracts to the inspection and regulation of the Board. Indeed, by carefully and exhaustively listing all the expressive media to which the prohibition applies, including every "movie, book, magazine article, tape recording, phonograph recording, radio or television presentation, [and] live entertainment," the legislature has targeted expression and the media as precisely and thoroughly as Maverick missiles recently targeted Iraqi tanks.

C. Section 632-a Is Content-Based

Section 632-a's application depends squarely on the content of the speech contracted for. Payment may be made for all speech *except for* speech that "reenact[s]" the crime or that "express[es] such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime." Section 632-a (1). The statute is therefore subject to strict scrutiny as a content-based regulation of speech, *Texas v. Johnson*, 491 U.S. 397, 412 (1989), as the Second Circuit panel unanimously held.

This Court has repeatedly held that regulations of speech whose application depends on the content or subject matter of the protected speech, or on the identity of the speaker, pose special dangers to free speech that warrant "the most exacting scrutiny." *See, e.g., Leathers v. Medlock, supra* (a "content-based regulation . . . will distort the market for ideas"); *United States v. Eichman*, 110 S. Ct. 2404, 2409 (1990); *Texas v. Johnson*, 491 U.S. at 406 (the government "may not . . . proscribe particular conduct *because* it has expressive elements") (emphasis in original); *Arkansas Writers' Project*, 481 U.S. 221; *First Nat'l Bank*, 435 U.S at 784-85 ("the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the persons who may address a public issue").[19]

Content-based distinctions need not be lodged in flat prohibitions to trigger strict scrutiny; strict scrutiny applies to content-based measures even where the underlying measures are time, place or manner regulations or otherwise do not themselves pose substantial burdens on speech. *E.g., Arkansas Writers' Project*, 481 U.S. at 227 (strict scrutiny applicable to subject-matter based sales tax regardless of size of tax burden); *Erznoznik v. City*

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19 *See also FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984) (among the "purest examples of a 'law . . . abridging the freedom of speech, or of the press' . . . [is a] regulation that denies one group of persons the right to address a selected audience . . . "); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Carey v. Brown*, 447 U.S. 455, 461-64 (1980); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972); and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 26 (1989) (White, J., concurring).

of Jacksonville, 422 U.S. 205, 215 (1975) ("even a traffic regulation cannot discriminate on the basis of content . . .").[20]

The Board's suggestion below that strict scrutiny is not required here because the statute is "justified without reference to the content of the regulated speech" under the holding of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is insupportable, both because the state has repeatedly justified section 632-a by its content, and because *Renton* has no application to measures that regulate speech directly, rather than only incidentally.

The Board has repeatedly justified the statute as necessary because "*depiction of the crime in the media often causes additional suffering* to victims and their families."[21] The Board called the statute necessary because "reenactment of the crime in the press by itself *causes a second harm* to the victim," and referred in the district court to "crime victims and their families *who suffer a second violation when a criminal sells the story of his crime to the media*."[22] The law's chief sponsor underlined the concern with content: "[i]t is abhorrent to one's sense of justice and decency that an individual, such as [Son of Sam], can expect to receive large sums of money *for his story*." JA 102. (Emphasis supplied.)

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20 *See also Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 20 (1986); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (citing cases); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 295 (1984).

21 Respondents' Brief in Opposition to the Petition for Certiorari ("Br. in Opp.") at 14 (emphasis added).

22 Board Reply Mem. in Support of Cross-Motion for Summary Judgment at 30-31, 34 (emphasis added).

These justifications for the statute, in addition to manifesting hostility to the speech that is subject to the statute, show that the law cannot be considered content-neutral. The "justifications for regulation [must] have nothing to do with content" — which is plainly not the case here — for a statute to be understood as content-neutral. *Boos v. Barry*, 485 U.S. 312, 320 (1988).

The statute is therefore squarely subject to strict scrutiny. "The emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself." *Texas v. Johnson*, 491 U.S. at 412 (citation omitted).

Not only does the Board seek to justify the Son of Sam law by reference to the content of the speech for which payment is prohibited, but *Renton* is inapplicable in any event. That decision, which has never been determinative in this Court in any subsequent case, addressed a zoning regulation governing the location of businesses purveying sexually oriented materials. The ordinance in *Renton*, although seemingly content-based, addressed only the secondary effects of speech and applied regardless of whether each particular film shown by regulated theaters had any specified content or subject matter.

Renton has never been applied to a measure that restricts speech on its face, which is what payment restrictions do under *Buckley* and *Meyer*, much less to a differential regulation of speech subject to *Minneapolis Star*. Thus, even accepting the Board's argument that section 632-a is, under *Renton*, not sufficiently "content-based" to draw strict scrutiny on that account, the statute would still be subject to strict scrutiny for the reasons set forth above in Points IA and IB *supra*.

D. *United States v. O'Brien* Is Inapplicable Because Section 632-a Is Not An Incidental Restriction on Speech

The demonstration above that section 632-a is subject to strict scrutiny because it burdens speech, is content-based, and singles out the media and those who engage in expression, necessarily forecloses application of the relaxed standard of *United States v. O'Brien*, 391 U.S. 367 (1965), as the Court of Appeals unanimously held. 10a-13a. Direct consideration of *O'Brien* also shows the Board's invocation of that standard is unavailing.

First, *O'Brien* applies only where a statute is aimed at a broad range of behavior and its application to speech is truly incidental. *O'Brien* is inapposite where a statute necessarily regulates speech "on its face." 391 U.S. at 375 (statute prohibiting draft card destruction regulates conduct like "a motor vehicle law prohibiting the destruction of drivers' licenses"); *see also Arcara*, 478 U.S. at 702, 707 (noting that *O'Brien* first inquired whether statute regulated expression on its face or conduct that was "necessarily expressive," and that *Minneapolis Star*, not *O'Brien*, applies to a statute that "has the inevitable effect of singling out those engaged in expressive activity").

Section 632-a's impact on speech is the opposite of incidental. Its intended and indeed *only* function is to prohibit certain payments for expression, and it applies to expression not sometimes but in *every* application. Payment for speech is not "conduct" within the meaning of *O'Brien*, and is not, to use *O'Brien*'s formulation, "within the constitutional power of the Government" to regulate. This Court has already rejected precisely the argument the Board advances here, holding that restrictions on payment for speech are not "comparable to the restrictions on conduct upheld in *O'Brien*." *Buckley*, 424 U.S. at 16.

O'Brien, moreover, does not apply to measures that regulate based on the content of speech. *E.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984). Section 632-a's impact on the speech it regulates can hardly be said to be incidental when the legislature explicitly chose to regulate only speech of that very content, and none other.

Finally, the interest assertedly underlying the Son of Sam law is related, not unrelated, to the suppression of free speech, because the very purpose of the statute was to reflect the public's "abhorrence" at particular exercises of First Amendment rights. The state's asserted interests in remedying the "additional suffering to victims and their families" often caused by "depiction of the crime in the media" (*see* p. 24 *supra*), and in avoiding the supposed affront to the public's "sense of justice and decency" that these exercises of First Amendment rights pose (*id.*), blossom only when a book communicates some message. *United States v. Eichman*, 110 S. Ct. 2404; *Texas v. Johnson*, 491 U.S. at 410 (citation omitted). "We are thus outside of *O'Brien*'s test altogether." *Id.*

II

THERE IS NO COMPELLING JUSTIFICATION AND NO NECESSITY FOR SUBJECTING ONLY PAYMENTS FOR EXPRESSION, AND ONLY PAYMENTS FOR EXPRESSION ON CERTAIN SUBJECTS, TO THE BURDENS OF SECTION 632-A

A. The Board Must Prove That the Statute and the Distinctions It Draws Are Necessary and Narrowly Tailored to Serve Compelling Interests

The Board must prove both that the burden of section 632-a is necessary to achieve a compelling state objective and that it is

necessary to restrict only speech and only speech of particular content in reaching that objective. *See, e.g., Arkansas Writers' Project., Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (interest in taxation does not justify content-based differential incidence of tax); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983) (interest in taxation does not justify differential taxation of the press); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (striking down statute permitting labor picketing in residential areas but not non-labor picketing, since "[a]ppellant can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern . . . the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute").

In addition, the Board must prove, not merely assert, the requisite necessity. *See Meyer v. Grant*, 486 U.S. 414, 426 (1988) (requiring state to "demonstrate" how challenged law is "necessary" to further interests, and striking statute where "no evidence [was] offered" to support the state's "speculation"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978) (requiring that state interests be supported by "record or legislative findings").

B. Section 632-A and Its Distinctions Are Not Necessary and Narrowly Tailored to Serve Compelling Interests

No one disputes our society's important interest in providing for the compensation of crime victims, and the following points are common ground:

- New York, like every state and the federal government, properly maintains a structure of tort law, appropriate civil remedies, and restitutionary and forfeiture measures to facilitate the compensation of crime victims out of the assets of those who have injured them;

- *all* of the assets of and payments due such tortfeasors may properly be made available to crime victims to secure satisfaction of claims and judgments;
- legislatures have broad powers to enhance existing generally applicable victim compensation remedies not only upon judgment but earlier as well.[23]

Simon & Schuster claims no First Amendment immunity from the obligation of all persons and businesses to comply with generally applicable post-judgment or pre-judgment remedies, and crime victims have in fact executed against royalties held by publishers and owing to tortfeasors without publisher objection. JA 35-36; *see also* JA 109.[24]

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23 In considering any generally applicable enhancements to existing remedies, the legislature would necessarily have to weigh the interests of all persons and businesses affected. By contrast, in enacting section 632-a, only the interests of criminal authors and the media — neither group having wide popular approval — were directly impaired. *See Minneapolis Star*, 460 U.S. at 585 ("[w]e need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency"); *Leathers v. Medlock*, *supra* (same); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J. concurring).

24 Below, Gerald Hollingsworth of Random House described how New York's general pre- and post-judgment remedies enabled the estate of murder victim Richard Adan to attach and, after judgment, execute against royalty payments due from Random House to author Jack Henry Abbott, author of *In the Belly of the Beast*. JA 35-36. (Because the book did not discuss the crime against Adan, section

(continued...)

The question is therefore not whether payments due criminals for expression may be made available to satisfy crime victims' claims; no one doubts that they may. Instead, the question is whether New York may single out certain speakers and certain expression and specially aid victims' efforts to recover from the proceeds of that expression, while providing no special aid to victims as to the proceeds of other expression or, indeed, as to assets gained in all other ways.

Section 632-a is not necessary to serve any of the interests that have been asserted to support it, and none of these interests explains or justifies section's 632-a's skewed application only to payments for speech of specified content.

1. Section 632-a's Distinctions Are Neither Necessary Nor Narrowly Tailored to Serve the Interest in Victim Compensation

The Board has conceded that "New York's interest is not to compensate the broad class of crime victims; rather, Section 632-a was enacted to benefit a special category of victims, *i.e.*, the victims of those criminals who seek to profit by telling the story of their crime." Br. in Opp. at 15. The concession that the law is too underinclusive to be successfully justified simply as a victim compensation measure was unavoidable, since the interest in victim

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24(...continued)
632-a did not apply.) As Hollingsworth stressed (JA 36),

> We do not contend that crime victims who obtain tort judgments are prohibited by the First Amendment from obtaining satisfaction from the proceeds of expressive activity.

compensation cannot begin to explain the law's restricted application to benefit only those few who are victimized by authors who write about the crimes.

Victim compensation does not explain the prohibition of payment only for speech (and only speech of specified content), while leaving criminals free to obtain unearned payments or payments earned for non-expressive activities. Victim compensation does not explain why New York prohibits Simon & Schuster from paying Henry Hill for *Wiseguy* while it would permit Drexel Burnham Lambert after the conviction of Michael Milken to pay Milken his salary, leaving Milken's victims to their ordinary civil remedies unaided by any special attachment. Nor does it explain the decision to reach only payments for certain expression, while giving no aid to the estate of murder victim Herman Tarnower, for example, should his killer Jean Harris write solely about prison conditions without mentioning her crime. *Children of Bedford, Inc.*, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989), *aff'd without op.*, 556 N.Y.S.2d 483 (1st Dep't 1990), *appeal pending* (Ct. of Appeals).

Similarly, the interest in victim compensation cannot explain why section 632-a would revive an expired claim if a criminal were to earn royalties through writing a book about an old crime, but does not revive a claim if a criminal has an inheritance or in some other way acquires assets that could be paid over to his or her uncompensated victims.

Section 632-a has also not been shown to be even useful, much less necessary, in aiding victims. The Board has conceded that it has been invoked no more than ten times, and has in fact aided victims of only a single criminal since 1977. *See* n.11 *supra*. In addition, loss to victims of income they could have seized from books not written or published, such as the three projects involving criminal primary sources that Nicholas Pileggi has foregone, likely

exceeds any payments attached by the Board, as Judge Newman noted in dissent. 25a. The law on balance probably works against the compensation of crime victims.

The Board, moreover, has expressly held that New York's existing generally applicable measures are adequate for crime victims. In an administrative determination holding section 632-a inapplicable against New York subway gunman Bernhard Goetz, the Board remanded Goetz' injured victim to "procedural safeguards contained in the [Civil Practice Law and Rules] that can be used to insure that any assets of Goetz will be available to satisfy any money judgment obtained against him."[25]

Among those existing provisions that "insure" the availability of the criminal's assets to satisfy money judgments are post-judgment remedies, *see* N.Y. Civil Practice Law & Rules [CPLR] §§ 5000-5252, and pre-judgment remedies, CPLR §§ 6201-6226. New York also provides for financial aid to crime victims, *see* N.Y. Executive Law §§ 630-31; for orders of restitution at sentencing which can be made a condition of probation, N.Y. Penal Law § 60.27 and N.Y. Crim. Proc. Law § 420.10 (1)(c); and for forfeiture of proceeds and instrumentalities of crime, CPLR §§ 1310-1352 and N.Y. Crim. Proc. Law §§ 480.00-480.35.

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25 *In re Bernhard Goetz*, *supra* n.7, slip op. at 8. Although Goetz was convicted of unlawful possession of the firearm which he had concededly used to cripple a youth Goetz claimed was menacing him, the Board found section 632-a inapplicable on the ground that his acquittal of assault and other charges rendered him not "convicted". The Board's decision in *Goetz* had no basis in the statutory text, and indicates that section 632-a's potential for viewpoint discrimination has been realized.

The Board made no attempt here to prove these remedies inadequate for crime victims, and the legislature considered no such evidence and made no such findings during the few days it considered section 632-a. In fact, the record reflects that these remedies have been successfully used in favor of crime victims in cases where the Son of Sam law did not apply. JA 35-36. But more to the point, if they are inadequate, no one has ever offered a coherent reason why they should be enhanced only as to the proceeds of certain speech while left unenhanced as to all other assets held by criminals.

In short, the statute with its various distinctions is substantially underinclusive with respect to victim compensation, and it has not in any event been shown necessary to further that interest. *See*, *e.g.*, *Arkansas Writers' Project*, 481 U.S. at 230; *Minneapolis Star*, 460 U.S. at 583; *Carey*, 447 U.S. at 465; *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 100 (1972).

2. Section 632-a's Distinctions Are Neither Necessary Nor Narrowly Tailored to Prevent Criminals From Profiting From or Exploiting Their Crimes

The state's undoubted interest in preventing criminals from profiting from their crimes is not truly implicated here and cannot save section 632-a. First, and fundamentally, the speech for which payment is prohibited cannot be deemed the "profits" of crime or the "exploitation" of crime consistent with the First Amendment. Moreover, as the panel below recognized, section 632-a is both substantially underinclusive and overinclusive with respect to ensuring that criminals do not profit from crime.

a. Royalties for books like *Wiseguy* are not the profits of crime.

Payment for the speech subject to section 632-a cannot be considered to be profit from crime under the First Amendment. The notion that all payments of royalties to authors who discuss their crimes constitute "profit" from crime is fundamentally flawed, inconsistent with both traditional understandings and free speech values.

The principle that royalties for a book are a return to the labors of authorship is inherent in the Constitution's scheme of inducing the creation of literary works by "assur[ing] authors" — not their subjects — "the right to [the author's] original expression". *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 59 U.S.L.W. 4251, 4252-53 (U.S. Mar. 27, 1991).[26] "[W]ritings . . . are the fruits of intellectual labor," as the Court recently noted, *id.*, and cannot be considered the fruits of crime except in the most indirect and trivial way.

Neither common law nor statutes have included payments for speech within the general definition of the fruits or proceeds of

26 *See also Stewart v. Abend*, 110 S. Ct. 1750, 1758 (1990) ("renewal term of copyright is the law's second chance to the author and his family to profit from his mental labors"); *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 546 (1985) ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors"); *New Era Publications Int'l v. Carol Publishing Group*, 904 F.2d 152 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990) (biographer, not assignee of biography subject, entitled to income from biography).

crime subject to restitution or forfeiture.[27] Payment for books subject to section 632-a are no more the "profits" of crime than royalties for presidential memoirs are "emoluments" of office (forbidden under the Constitution, Art. II, § 12, cl.5), or than advances for the memoirs of corporate executives are corporate opportunities. *Wiseguy* is simply not a case, like those applying the principle that no one should profit from crime,[28] where the economic benefit motivates and flows proximately from the illegal act.

No different result obtains by asserting that the speech whose payment section 632-a prohibits is the "exploitation" of crime causing "additional suffering" and offending the public's "sense of decency." Br. in Opp. at 14; *see also* pp. 24-25 *supra*. Neither offensiveness nor the "suffering" that non-defamatory speech can sometimes cause provides a basis on which speech can be regulated. *United States v. Eichman*, 110 S. Ct. 2404; *Texas v. Johnson*, 491 U.S. at 414; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56

27 In New York, as in other jurisdictions, the proceeds or fruits of crime have included only the money, securities, or goods directly obtained in a crime. *See, e.g., People v. Smith*, 537 N.Y.S.2d 65 (2d Dep't 1989); *City of New York v. Cosme*, 413 N.Y.S.2d 20 (1st Dep't 1979); *see also* Goebel & Naughton, *Law Enforcement in Colonial New York*, at 717 (The Commonwealth Fund 1944) (after colony abolished forfeiture of all a felon's goods, orders of restitution were limited to stolen goods and instruments of death). Federal cases are to the same effect. *E.g., Warden v. Hayden*, 387 U.S. 294 (1967) (fruits of crime described as stolen property or property whose possession is a crime).

28 *E.g, Riggs v. Palmer*, 115 N.Y. 506 (1889) (precluding inheritance by beneficiary who committed murder to inherit).

(1988) ("adverse emotional impact" provides no valid basis for burdening speech).

Holding that the prior criminal conduct of an author or primary source transforms payments for speech into profit from crime in any event improperly focuses on the character of a speaker. The proper focus is not on the speaker but on "whether [the law] abridges expression that the First Amendment was meant to protect." *First Nat'l Bank*, 435 U.S. at 776; *id.* at 776-78, 781-83; *see also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 765 (1976) (right to receive information); *Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1965) (same); *cf. Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ."). Since *Wiseguy* is fully protected speech, the First Amendment forbids a prohibition on the payments without which it could not have been written, regardless of the Board's assessment of Henry Hill's prior conduct.

A law that would, had it been in effect at the time and place of publication, prohibit payment for works like *The Autobiography of Malcolm X*, *Where Do We Go From Here* by Martin Luther King Jr., *Narrative of the Life of Frederick Douglass, An American Slave: Written by Himself*, *Manchild in the Promised Land* by Claude Browne, *Every Secret Thing* by Patty Hearst, *Soul on Ice* by Eldridge Cleaver, *Borstal Boy* by Brendan Behan, *A Thief's Journal* by Jean Genet, *Witness* by Whitaker Chambers, *Lady Sings the Blues* by Billie Holliday, *How I Became a Socialist* by Jack London, *Blind Innocence* by John Dean, *On Civil Disobedience* by Henry David Thoreau, and *Wiseguy* itself, has the impermissible

effect of depriving the public of speech "that the First Amendment was meant to protect."[29]

b. Section 632-a is not narrowly tailored to prevent criminals from profiting from crime.

Even assuming *arguendo* that payments for speech could ever be considered the profits of crime, section 632-a is substantially

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29 The body of published writings that would have been subject to the Son of Sam law had it been in effect at the time and place of publication, ranging from narratives by fugitive slaves to writings by prisoners and ex-prisoners, is enormous. A list of hundreds of such works written by convicted and incarcerated criminal authors in America during the years 1789 to 1988, and discussing their importance, may be found in Franklin, *Prison Literature in America* at 291-341 (Oxford University Press, Expanded Edition, 1989).

Franklin writes that at times the "spectacle" of incarcerated criminals "actually publishing books which were being received as literary achievements or intelligent social analysis" was seen by society as "fundamentally threatening." This led to "suppression" of such works in the 1930s, for example at San Quentin, where "'cells were searched . . . not for narcotics or knives, but for manuscripts,' and all those found were removed and presumably destroyed." Franklin, *supra*, at 161-62, quoting from deFord, "Shall Convicts Write Books?" *Nation* 131 (Nov. 5, 1930) at 496. The Son of Sam law is merely a recent and more sophisticated instance of "suppression" of such disfavored books.

Among the leading writers who have been incarcerated for crime, and whose autobiographies if written would thus be subject to a Son of Sam-type law, are Villon, Thomas More, Cervantes, Walter Raleigh, John Donne, Richard Lovelace, Daniel Defoe, Voltaire, Diderot, Thoreau, Melville, Oscar Wilde, Jack London, O'Henry, Robert Lowell, and Bertrand Russell. *See Franklin*, *supra* at 233.

underinclusive with respect to the interest in assuring that criminals not profit from crime.

First, that the law provides for the payment of the escrow fund to the criminal if no claims are made within five years makes plain that preventing criminals from profiting from crime is not truly the interest underlying this statute. Indeed, subject to the five year waiting period, the law allows *all* criminals whose assets are adequate to compensate their victims to "profit" by writing about their crimes. The law also allows all those who commit victimless crimes eventually to profit through writing about them.

"[A] law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interests unprohibited." *The Florida Star v. BJF*, 491 U.S. 524, 541-42 (1989) (citation omitted); *see also Carey*, 447 U.S. at 465 & n.9; *First Nat'l Bank*, 435 U.S. at 793. The majority below recognized that the crime-should-not-pay rationale could not justify section 632-a for this same reason: "[e]ven under the statute, criminals may receive payments . . . if no victims come forward with claims or if funds remain after all claims are paid." 13a.

Nor does the crime-should-not-pay maxim explain why the legislature did not provide for the attachment of all the other payments by which criminals (including the unconvicted and immunized, like Henry Hill) "profit" from crime. The payments made to Willie Sutton, the career bank robber who was engaged as a bank security consultant after many years in prison, or to reformed drug addicts who become drug rehabilitation counselors at centers like Daytop and Phoenix House, or to those who use

their prior life of crime as a springboard to an evangelical career,[30] or to a reformed burglar using his expertise as a locksmith,[31] or even to those who are immunized and enter the witness protection program or are engaged as confidential informants, are illustrative of the myriad different ways in which criminals "profit" in ways dependent on their criminal experiences, none of which New York has seen fit to reach.

Nor does the crime-should-not-pay rationale explain why the law fails to reach payments for books in which a criminal author fictionalizes his experience, such as Herman Melville's novels *Omoo* and *Typee* (drawing on Melville's experiences as a mutineer and deserter) or some of Jack London's works. New York also allows those who become notorious through crime (Bernhard Goetz, Tawana Brawley, and Jack Henry Abbott, for example) to capitalize on their fame through television interviews, books on subjects other than their crimes, and in other ways so long as they do not write or speak about their crimes. Abbott's book on prison conditions no doubt had its sales increased in consequence of the public notoriety of his murder of Richard Adan, yet the law did not aid Adan's heirs.

In short, the asserted interest does not explain the law's content-based underinclusiveness, and therefore cannot rescue it.

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30 For example, Watergate felon Charles Colson, or Freddie Gage, who enhanced his credibility and earned his living as a born-again preacher by pointing to his triumph over early criminal experience, which he subsequently wrote about in *Pulpit in the Shadows* (1966).

31 *See New York Times*, January 4, 1990, C2, col. 4, for a story about "safecrackers" who make their living opening malfunctioning safes and the safes of the deceased and those who have forgotten their combinations.

Arkansas Writers' Project, 481 U.S. at 231-33 (asserted state interests failed to explain content-based regulation); *Minneapolis Star*, 460 U.S. at 586 (interest in taxation "cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available); *Carey*, 447 U.S. at 465 (underinclusiveness of statutory restriction "would seem largely to undermine appellant's claim that the prohibition of all non-labor picketing can be justified by reference to the State's interest in maintaining domestic tranquility"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) ("Appellee offers no justification, nor are we aware of any, for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic").

Section 632-a is also substantially overinclusive with respect to the not-profiting-from-crime interest, again assuming that speech can ever be considered the profit from crime. Publishers cannot make any part of the payment to an accused or convicted person for any work mentioning the crime, no matter how slight the mention or how unimportant in the context of an entire book. *See Children of Bedford, Inc. v. Petromelis*, *supra* (upholding application and constitutionality of Son of Sam law).

Thus, for example, Malcolm X was already famous as a Black Muslim political leader when he wrote his compelling *Autobiography*, and the royalties due Malcolm X were in no sense the profits of crime. Yet the Son of Sam law, had it been in effect at the time and place of publication, would have prohibited him from receiving for five years any of the compensation due him for the work because it also discusses his early life of crime. So too with *Where Do We Go From Here?*, which describes Martin Luther King Jr.'s arrest in Birmingham, or works like *Somebody Up There Likes Me*, by Rocky Graziano.

The statute's application to works principally on subjects other than their authors' crimes goes far beyond any circumstances in which the state's legitimate interest may be implicated and necessarily results in gratuitous deterrence of protected speech. For example, interest would be high in an autobiography by Bess Myerson, a former Miss America who gained high public office; the royalties she would earn are hardly the fruits of crime. Yet she would be deterred in an autobiography from explaining why she shoplifted $40 worth of cosmetics[32] had that crime occurred in New York.

3. Section 632-a's Distinctions Are Neither Necessary Nor Narrowly Tailored to Prevent Criminals From Exploiting or Profiting From Their Crimes While Their Victims Remain Uncompensated

Recognizing that neither victim compensation nor the interest in assuring that criminals not profit from crime can save section 632-a from condemnation under strict scrutiny, both the Court of Appeals and the Board reformulated the state's interest by mixing the two together. In the words of the Court of Appeals, the Son of Sam law is justified because "[o]ur society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for the financial loss occasioned by the crime." 13a-14a. But our society also "deems it fundamentally unfair" if a criminal enjoys the fruits of an ordinary inheritance, or of a book about a subject other than the crime, or a stock portfolio, or any other asset, "while the victim remains uncompensated." This justification fails because

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32 *See The New York Times*, September 13, 1988, B1, col. 4.

New York cannot explain why it remedies this unfairness only in cases of certain speech.

Moreover, as Judge Newman correctly observed (20-21a), by describing the state's interest in terms that precisely mirror what the statute does (attaching for the benefit of the crime victim only payments for certain expression until the victim is compensated), the majority used word play to side-step its obligation to find a compelling justification for the content and speaker-based distinctions and press-targeting that is presumptively invalid under this Court's decisions.

The circular approach of the decision below results in Rube Goldberg-like formulations of state interest that render strict scrutiny toothless. Just as Illinois' statute barring only non-labor picketing outside private homes could not be justified as narrowly tailored to keep non-labor picketing from disturbing tranquility (why should Illinois not protect tranquility against all picketing?), *Carey*, 447 U.S. at 465, so too, New York's Son of Sam law may not properly be justified as "narrowly tailored to the State's interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization." 15a. Why should New York not assure that, until their victims are compensated, criminals will be denied the enjoyment of all assets, not just payments by publishers for certain instances of the exercise of free speech rights?

This asserted interest also incorrectly assumes that all works mentioning a crime involve payments for nothing except the "recounting" or "exploiting" of that crime. A moment's consideration of the works named above on p. 36 — all valuable contributions to society achieved through authorial effort and creativity — shows that any royalties involved are hardly payments for the crimes.

Finally, this interest supposedly served by the law cannot explain why the law applies to victimless crimes or to criminals whose assets are in any event adequate to compensate their victims (as, for example, Bess Myerson's would seem to be, *see* p. 41, *supra*).

The Court of Appeals also sought to excuse the statute's focus on speech only of specified subject matter with the assertion that "as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes." 15a. This is sheer speculation, and does not amount to compelling necessity for singling out speech when generally applicable regulation would serve as well without raising any censorial threat. *See Meyer*, 486 U.S. at 426 (invalidation where "no evidence [was] offered" to support "speculation"); *Arkansas Writers' Project*, 481 U.S. at 231-33; *Carey*, 447 U.S. at 464-69.

Moreover, the legislature did not find, the state has never argued, and there is little reason to believe that the sole asset of most criminals — especially those likely to obtain book contracts — is the opportunity to tell their stories, as the dissent observed. 21a. For the vast majority of criminals, the opportunity to tell their stories is no asset at all. And the criminals able to sell their stories are those most likely to have the skills enabling them to acquire other assets as well.

• • • • •

In sum, a crime victim's need for compensation extends to all the tortfeasor's assets, not just those arising from speech, and society's interest in justice and retribution is simply not implicated by the books singled out and deterred by section 632-a, certainly not in any way different from many other assets and sources of income that section 632-a leaves unregulated. If New York deems

its existing remedies inadequate in some respects to ensure that crime victims' tort judgments will be satisfied, the First Amendment compels New York to improve those measures without singling out (certain) speech for special adverse treatment.

CONCLUSION

The judgment below should be reversed, and the case remanded for entry of a declaration that section 632-a is unconstitutional, an injunction enjoining its enforcement, and an order awarding petitioner costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

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April 19, 1991

BEST AVAILABLE COPY

QUESTION PRESENTED

Should New York Executive Law ("Exec. Law") § 632-a (McKinney 1982 & Supp. 1991), which requires any entity that contracts to pay a criminal for discussion or reenactment of his crime to give all money owed the criminal to the New York State Crime Victims Board for the benefit of the victims of that crime, be declared valid under the First Amendment to the U.S. Constitution, where the law (i) does not directly or substantially burden speech or publication; (ii) serves a compelling interest in ensuring that criminals do not profit from their crimes before their victims have a meaningful opportunity to be compensated for their injury and suffering; (iii) is necessary to serve the state's compelling interest by permitting victims to obtain compensation from the criminals' asset derived from storytelling about their crimes; and (iv) achieves that interest through means that are no broader than necessary and narrowly tailored because they are limited to the statute's objective?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1059

SIMON & SCHUSTER, INC.,

Petitioner,

—against—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH and ANGELO PETROMELIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

I. Exec. Law § 632-a

A. The Statute

New York has long recognized the common law maxim that no person shall be permitted to profit by his own wrongdoing. In *Riggs v. Palmer*, 115 N.Y. 506, 511-512, 22 N.E. 188, 190 (1889), the New York Court of Appeals stated: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong. . . . These maxims are dictated by public policy, have their foundation in universal law

administered in all civilized countries, and have nowhere been superseded by statutes." Justice Cardozo later explained the reasoning underlying the decision in *Riggs*:

> That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Conflicting principles were there in competition for the mastery. . . . There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong. The logic of this principle prevailed. . . .

B. Cardozo, *The Nature of the Judicial Process* 40-41 (1921).

Almost ninety years after *Riggs* was decided, New York enacted a statute, Exec. Law § 632-a,[1] entitled "Distribution of moneys received as a result of the commission of crime," which applies this equitable principle to criminals who profit from selling the story of their crime. Exec. Law § 632-a(1) requires that any entity[2] that contracts with a criminal[3]

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1 The statute is reproduced in the Appendix to the Petition for A Writ of Certiorari at pages 55a-58a. "_____a" refers to the Appendix to the Petition for A Writ of Certiorari, dated December 1990. "JA _____" refers to the Joint Appendix in this Court.

2 The statute applies to "[e]very person, firm, corporation, partnership, association or other legal entity. . . ." that contracts with a criminal or the representative or assignee of a criminal. Exec. Law § 632-a(1).

3 The statute defines "criminal" as a person accused or convicted of a crime committed in New York as well as a person who voluntarily and intelligently admits committing a crime. Exec. Law §§ 632-a(1), (10)(b). If the charges against an accused person are dismissed or if the person is acquitted, he is entitled to return of any money received by the Board. Exec. Law § 632-a(3).

regarding the reenactment or discussion[4] of a crime committed by the criminal turn over to the New York State Crime Victims Board (the "Board"), an executive agency charged with enforcing the statute, a copy of the contract and the money owing to the criminal under the contract. The Board then holds the money in an escrow account for five years, and, during that time, the crime victim or the crime victim's estate can bring a civil lawsuit against the criminal. The lawsuit is not barred by the expiration of the regular statute of limitations for a tort or wrongful death action[5] because section 632-a creates a new *in rem* cause of action with its own five year statute of limitations which commences when the escrow account is established. Exec. Law § 632-a(7).

The Board is required to publicize in newspapers of general circulation the availability of the money in the escrow account to satisfy any judgments obtained by victims of the crime (Exec. Law § 632-a(2)) and then to satisfy any judgments out of the escrow account. Exec. Law § 632-a(1).[6] The

4 The statute applies to the reenactment of a crime "by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind," or from the expression of the criminal's "thoughts, feelings, opinions or emotions regarding such crime, . . ." Exec. Law § 632-a(1).

5 *See*, New York Civil Practice Law and Rules ("CPLR") §§ 214(5), 215(3) and 215(8) (McKinney 1990); New York Estates, Powers & Trust Law ("EPTL") § 5-4.1 (McKinney 1981 & Supp. 1991).

6 The statute also prohibits criminals from transferring their legal interest in the profits to other entities. Exec. Law § 632-a(9) prohibits any action taken by a criminal "by way of execution of a power of attorney, creation of corporate entities or otherwise" that defeats the purpose of the statute. This provision was recently applied to invalidate Jean Harris's attempt to assign a portion of her profits from the book *Stranger in Two Worlds* to a foundation, Children of Bedford, Inc., that she helped establish. *Children of Bedford, Inc. v. Petromelis*, 541 N.Y.S.2d 894, 898 (Sup. Ct. N.Y. Co. 1989), *aff'd on op. below*, 556 N.Y.S.2d 483 (1st Dep't 1990), *aff'd*, 1991 WL 70950, _____ N.Y.S.2d _____, _____ N.E.2d _____ (Ct. of Appeals

victim is entitled to the money in the account even if the entity never produces the work as long as the payments are owed to the criminal under the contract. The money in the escrow account is distributed in accordance with priorities set forth in the statute to ensure that the victims are paid before the criminal as well as before other judgment creditors, except that a small percentage of the account is available to the criminal to pay legal fees in his criminal case and to a representative who assisted the criminal in producing the criminal's speech, and the state is reimbursed for any money it paid the victims under Exec. Law, Article 22, New York's general victim compensation scheme, but not to exceed one-half of the victim's judgment.[7] Exec. Law §§ 632-a(8), (11).

New York's statute attempts to redress the unfairness of criminals profiting from their crime story before their victims are compensated for their injury and suffering. The special procedures in the statute are designed to remedy the unique problems faced by victims of publicized crimes. Most crime victims do not sue criminals for their injuries and suffering because the criminal usually does not have any significant assets from which a civil judgment may be satisfied.[8] Even

May 7, 1991). *See generally*, Note, *Alabama's Anti-Profit Statute: A Recent Trend in Victim Compensation*, 33 Ala. L. Rev. 109, 114 and n.23 (1981).

7 Under Article 22, crime victims may apply to the Board for compensation, within certain limits, for medical expenses, essential personal property lost, damaged or destroyed as a direct result of a crime, occupational therapy or similar rehabilitative services, lost earnings and burial expenses. Exec. Law §§ 623(5), 626, 631.

8 *See* Linden, *The Report of the Osgoode Hall Study on Compensation for Victims of Crime* 21 (1968), cited in Lamborn, *The Propriety of Governmental Compensation of Victims of Crime* ["Lamborn, *Govt. Comp.*"], 41 Geo. Wash. L. Rev. 446, 451 n.20 (1973) ("Only 15 percent of the victims even consider suing; five percent consult a lawyer. Slightly fewer actually try to collect, and only two percent collect anything."); *Report of the President's Commission on Crime in the District of Columbia* 130 (1966) cited in Lamborn, *Govt. Comp.* at 453 n.32. *See also* Linden, *Victims of*

"[i]f the defendant does have money or property at the time of the offense, it is quickly exhausted on bail and/or legal expenses."[9] If an entity desires to pay a particular criminal to sell the rights to his crime story, the criminal may profit considerably from the contract which is usually the criminal's only significant asset.[10] Unfortunately, the victims of that crime may not be able to recover for their injury and suffering from this asset because these profits may be acquired many years after the crime or conviction took place and, therefore, after the tort and wrongful death action statute of

Crime and Tort Law, 12 Can. B. J. 17 (1969), reprinted in *Considering The Victim*, 238 (J. Hudson & B. Galaway eds. 1975) (discussing Osgoode Hall study); R. Reiff, *The Invisible Victim: The Criminal Justice System's Forgotten Responsibility* 137 (1979); R. Meiners, *Victim Compensation* 3 (1978); Project, *Congress Opens A Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, ["Project, *Restitution Provisions of the VWPA*"], 52 Fordham L. Rev. 507, 568-69 (1984), citing Bureau of Justice Statistics, U.S. Dep't of Justice Sourcebook of Criminal Justice Statistics, 364 (1982).

9 Schultz, *The Violated: A Proposal To Compensate Victims Of Violent Crime*, ["Schultz, *The Violated*"], 10 St. Louis Univ. L. J. 238, 243 (1965); *see also* A. Karman, *Crime Victims: An Introduction to Victimology* 193 (1984).

10 For example, Henry Hill had already been paid almost $100,000 for the rights to his story at the time the Board learned of the contract for *Wiseguy*. *See* discussion *infra* at p. 12. It was also reported that John Walker, who confessed to espionage, expected to earn more than a million dollars from the book and movie rights for the story of his 18 years of espionage. *Justice Dept. May Move to Bar Book Profits for Spies*, L.A. Daily Journal, July 11, 1986 at 3. *See also Checkbook Journalism*, Newsweek, Dec. 29, 1969, at 45-46 (discussing six figure sum paid to Susan Atkins for a jailhouse interview of her involvement in the murder of actress Sharon Tate and others while she was still charged with the crime); *Marching to Emporia*, L.A. Times, Aug. 10, 1986, (Calendar), at 20 (discussing six figure sum believed to have been paid by television producer to the Rev. Thomas Bird, who was convicted of murdering his wife, and to Lorna Anderson, who, along with Bird, was convicted of plotting the murder of Anderson's husband); *see generally* Note, *Publication Rights Agreements In Sensational Criminal Cases: A Response To The Problem*, 68 Cornell L. Rev. 686 n.2, 687 n.4 (1983) (discussing books, articles and movies in which publishers paid large sums of money to criminals to acquire publication rights to their criminal story).

limitations have run.[11] Even if the statutes of limitations have not run, unless the victims can succeed in attaching the criminal's profits before obtaining a civil judgment, the assets may be dissipated or some other judgment creditor may satisfy his outstanding judgment before the victims obtain their judgment.

Therefore, without the special procedural protections in New York's statute, a criminal could be paid a large sum of money for selling the story of his crime while his victims would be left without any meaningful remedy to recover for their injury and suffering. Recognizing the inequity in this situation, the New York courts rejected a challenge to the special statute of limitations provision by a criminal profiting from a movie contract whose victim had failed to sue the criminal within the ordinary statute of limitations period:

> Clearly, it is not for lack of merit that the victim of a crime does not at once sue for the tortious injury. In fact the criminal conviction would be conclusive proof of most of the elements necessary to recover on an analogous claim in tort. The obvious reason that a victim ordinarily withholds suit is that he believes that the defendant is indigent, so that the expenditure of the time and money involved in a civil litigation would be of no avail. . . . It would be ironic to hold that a victim who may have been killed, maimed or otherwise injured is to be left remediless while the felon could reap the 'fall-out' rewards of the victim's injuries.

Barrett v. Wojtowicz, 414 N.Y.S.2d 350, 356-357 (2d Dep't 1979).

While the statute attaches the criminal's profits for the sake of victims, as the publication of *Wiseguy* demonstrates, it does not prohibit a criminal from speaking about his crime

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11 *See* Comment, *In Cold Type: Statutory Approaches To The Problem Of The Offender As Author* ["Comment, *In Cold Type*"], 71 J. Crim. L. & Criminology 255, 267 (1980) (discussing criminals' cooperation in 1977 book and 1978 film concerning the $1.5 million robbery of the Boston office of Brink's Inc. that took place in 1950).

nor does it prohibit a publisher from publishing the criminal's reenactment or discussion of the crime. Moreover, the statute does not require a publisher to forfeit his profits or to edit discussion of a crime from a book.

Although the statute may affect an incentive to speak for those criminals who insist upon being paid immediately to tell the story of their crime, New York's statute contains a number of provisions to encourage criminals to speak about their crimes. First, the statute allows the criminal to receive a portion of the escrowed money to pay legal fees in his criminal case, thereby permitting him, if he has insufficient assets, to afford private counsel. Exec. Law § 632-a(8). Second, a representative of the criminal, such as a literary agent, may obtain his fee (customarily ten percent) in assisting the criminal to produce the work. *Id.* This provision encourages representatives to assist the criminal in selling his crime story and aids compensation for victims. Third, the criminal who wishes to financially repay his victims can assist his victims by selling (and telling) the rights to his crime story because, under this statute, the victims' judgments take *priority* over the unsatisfied judgments of other creditors, including state and local government tax authorities, who are also not entitled to the benefit of the special statute of limitations provision. Exec. Law §§ 632-a(11), (c), (d). Fourth, a person accused of a crime who wishes to proclaim his innocence and be paid for doing so is entitled to have all money returned if he is acquitted or the charges are dismissed. Exec. Law § 632-a(3).[12] Finally, the criminal is entitled to all money remaining in the escrow account after victims' judgments, and any other creditors' judgments, are satisfied. Exec. Law §§ 632-a(4), (11)(e).

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12 *See Welch Says His Lawyer Will Take Legal Fees From Potential Book Profits*, Wash. Post, March 29, 1981 at A9 (discussing interviews accused murderer Bernard Welch gave professing his innocence); *Checkbook Journalism*, Newsweek, Dec. 29, 1969 at 45 (discussing interview given by Susan Atkins, then charged with murdering Sharon Tate and others, in which she maintained that she acted in self-defense).

B. Legislative History

New York's statute was passed after it was reported that a serial murderer, called Son of Sam, was being offered money for selling the rights to his story. (The statute is, therefore, commonly referred to as the "Son of Sam" law). "McGraw-Hill Book Company later bought the rights to Berkowitz's [Son of Sam's] story in a deal that included a $250,000 advance, $150,000 profit to the ghost writer, [10 percent to the literary agent] and $75,000 to Berkowitz through his court-appointed conservator Doris Johnsen." Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality* ["Okuda, *Criminal Antiprofit Laws*"], 76 Calif. L. Rev. 1353, 1354 (1988) (citation omitted).[13]

As the author of the bill noted:

> It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured—while five people are dead, other people

13 On October 31, 1977, a conservator was appointed by the New York Supreme Court to manage and preserve David Berkowitz's assets. *See In re Johnsen (Berkowitz)*, 430 N.Y.S.2d 904 (Sup. Ct. Kings Co. 1979), *aff'd on op. below*, 429 N.Y.S.2d 886 (2d Dep't 1980), *lv. to appeal denied*, 433 N.Y.S.2d 426, 413 N.E.2d 365 (1980). "The primary purpose for the appointment of the conservator was to generate funds for the victims of [Berkowitz's] crimes. This was to be done by capitalizing on the public interest in crimes of violence through the publication of books, movies, etc." *New York State Crime Victims Board v. Johnsen (Berkowitz)*, (Sup. Ct. Kings Co. Nov. 24, 1981). Berkowitz requested that all of the proceeds from any movie or book go to the Board for the benefit of his victims. JA 111. The book, *Son of Sam*, authored by Lawrence D. Klausner, was published in 1981 by McGraw-Hill Book Company. The author notes that "[H]alf of my royalties—the money David Berkowitz would receive—will go to repay, as much as money can repay, survivors of Berkowitz's attacks and the families of those who did not." *Son of Sam*, p. 8. In a decision issued in August, 1987, the court granted the conservator's motion to settle the final accounting of the $118,433.36 fund consisting of Berkowitz's share of royalties from the book *Son of Sam* by Klausner and fees he received for interviews. The money was distributed, in accordance with a settlement agreement, to twelve of his victims or their estates, with the largest distribution of $45,000 going to a victim who was shot in the spine and paralyzed. *In re Johnsen*, (Sup. Ct. Kings Co.), N.Y.L.J., Sept. 2, 1987 at 1, col. 3, and at 15, col. 3.

> were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the *victim must be more important than the criminal.*

Memorandum of Senator Emanuel R. Gold, *reprinted in* 1977 New York State Legislative Annual 267 (emphasis added).[14]

The legislative history makes clear that the overriding purpose of the bill is to protect the rights of victims of publicized crimes to receive compensation *before* the criminal is paid for telling the story of his crime:

> Currently, a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. *This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.* The requirement of a civil action will prevent the abuse of this privilege.

See Assembly Bill Memorandum Re: A 9019, July 15, 1977, *quoted* at 916 F.2d at 782 (14a) and *reprinted in* Legislative Bill Jacket, N.Y. Laws of 1977, ch. 823 (emphasis added).

Exec. Law § 632-a was signed by the Governor and enacted into law on August 11, 1977. N.Y. Laws of 1977, ch. 823, *reprinted in* McKinney's 1977 Session Laws of New York, pp. 1321-1322. The statute has been amended several times to strengthen its scope, expand its coverage and set forth priorities for paying out the money in the escrow account.[15]

14 *See Criminals' Revenues from Stories Curbed*, N.Y. Times, Aug. 13, 1977, at 20, col. 3 (sponsor of the New York bill stated "he developed the bill after reading a newspaper account during the hunt for the 'Son of Sam' stating that the killer 'stood to get rich' and that there would be people 'waiting at the precinct house to get him to sign a contract' "; *see also 'Son of Sam' Case Poses Thorny Issues for Press*, N.Y. Times, Aug. 22, 1977, at 1, col. 1 (discussing ethical problems posed for press by coverage of killings and alleged $50,000 to $100,000 requested for taped interview with Berkowitz).

15 *See* Memorandum of Senator Emanuel R. Gold, *reprinted in* 1978 New York State Legislative Annual 243; N.Y. Laws of 1978, ch. 417,

Other states have adopted similar laws. In the past 14 years, 42 states and the federal government have enacted statutes modeled after New York's law.[16]

II. Exec. Law § 632-a And *Wiseguy*

Henry Hill was arrested in April 1980 and charged with six counts of conspiracy to sell drugs. JA 50, ¶ 1. In May 1980, Hill entered the Federal Witness Protection Program in

reprinted in McKinney's 1978 Session Laws of New York, pp. 722-723; Memorandum of Senator Ralph J. Marino, *reprinted in* 1981 New York State Legislative Annual 247; N.Y. Laws of 1981, ch. 445 §§ 2, 3, *reprinted in* McKinney's 1981 Session Laws of New York, pp. 908-910.

16 The state statutes are: Ala. Code §§ 41-9-80 to 84 (1982); Alaska Stat. § 12.61.020 (1990); Ariz. Rev. Stat. Ann. § 13-4202 (1989); Ark. Stat. Ann. § 16-90-308 (1989); Cal. Civ. Code § 2225 (West Supp. 1991); Colo. Rev. Stat. §§ 24-4.1-201 to 207 (1988 and Supp. 1990); Conn. Gen. Stat. Ann. § 54-218 (West 1985); Del. Code Ann. tit. 11, §§ 9101 to 9106 (1987 & Supp. 1990); Fla. Sta. Ann. § 944.512 (West 1985 & Supp. 1990); Ga. Code Ann. §§ 17-14-30 to 32 (1990); Haw. Rev. Stat. §§ 351-81 to 88 (Supp. 1989); Idaho Code § 19-5301 (1987); Ill. Ann. Stat. ch. 70, ¶ 411 (Smith-Hurd 1989 & Supp. 1990); Ind. Code Ann. §§ 16-7-3.7-1 to 6 (Burns 1990); Iowa Code Ann. § 910.15 (West Supp. 1991); Kan. Stat. Ann. §§ 74-7319 to 7321 (Supp. 1989); Ky. Rev. Stat. Ann. § 346.165 (Bobbs-Merrill 1983); La. Rev. Stat. Ann. §§ 46:1831 to 1839 (West 1982); Md. Ann. Code Art. 27, § 764 (1988); Mass. Gen. Laws Ann. ch. 258A, § 8 (West 1989); Mich. Comp. Laws Ann. § 780.768 (West Supp. 1990); Minn. Stat. Ann. § 611A.68 (West 1987 & Supp. 1991); Miss. Code Ann. §§ 99-38-1 to 11 (Supp. 1990); Mo. Ann. Stat. § 595.045(14) (Vernon Supp. 1991); Mont. Code Ann. § 53-9-104 (1)(d) (1989); Neb. Rev. Stat. §§ 81-1836 to 1842 (1987); Nev. Rev. Stat. § 217.265 (1986); N.J. Stat. Ann. §§ 52:4B-26-33 (West 1986); N.M. Stat. Ann. § 31-22-22 (Supp. 1990); Ohio Rev. Code Ann. §§ 2969.01 to 2969.06 (1987); Okla. Stat. Ann. tit. 22, § 17 (1991); Or. Rev. Stat. § 147.275 (1989); Pa. Stat. Ann. tit. 71, § 180-7.18 (Purdon 1990); R.I. Gen. Laws §§ 12-25.1-1 to 12 (Supp. 1990); S. C. Code Ann. §§ 15-59-40 to 80 (Law. Co-op. Supp. 1990); S.D. Cod. Laws Ann. § 23A-28A-1 (1988); Tenn. Code Ann. §§ 29-13-201 to 208 (1990); Tex. Rev. Civ. Stat. Ann. art. 8309-1 §§ 16 to 18 (Vernon 1991); Va. Code §§ 19.2-368.19 to .22 (1990); Wash. Rev. Code Ann. §§ 7.68.200 to .280 (Supp. 1991); Wis. Stat. Ann. § 949.165 (West 1990); Wyo. Stat. § 1-40-112(d)-(g) (1988). The federal government's statute is Special Forfeiture of Collateral Profits of Crime Act, 18 U.S.C.A. §§ 3681-3682 (West Supp. 1991).

exchange for his agreement to cooperate with various law enforcement agencies involved in investigating, among other crimes, the six million dollar Lufthansa Airlines theft at Kennedy International Airport. *Id.*, ¶ 2.

In 1981, Hill asked his attorney Robert Simels for assistance in finding someone to write his life story. JA 116, ¶ 7. Simels contacted Sterling Lord, a literary agent, who suggested that a book about the inner workings of organized crime could be "meaningful and successful" and arranged for Simels to speak with Nicholas Pileggi, an established writer and a client of Lord's agency. *Id.*, ¶¶ 7, 8. After Lord was advised that Hill and Pileggi wanted to work together to prepare and write such a book, Lord contacted Michael Korda, Editor-in-Chief of Simon & Schuster "to attempt to interest Simon & Schuster in the book . . . ." *Id.*, ¶ 9. Simon & Schuster subsequently advised Lord that it desired to acquire publication rights in the book. *Id.*[17]

On August 21, 1981, Hill and Pileggi signed an agreement to, *inter alia*, cooperate with each other in the preparation and sale of a book-length manuscript concerning Hill's life and to divide all money received in the sale of the book and any performance rights according to specified percentages. JA 83-85. On September 1, 1981, Simon & Schuster, Hill and Pileggi entered into a standard publishing agreement by which Hill and Pileggi (called the "Author") sold exclusive publishing rights to a work denominated as an "Untitled Autobiographical Non-Fiction about the Mafia." JA 56-82.

The publishing agreement provided that the Publisher shall pay the Author an advance and royalties in several stages.

17 The events surrounding the publication of *Wiseguy* are based on an affidavit sworn to on December 4, 1987 by Lord and submitted by him to the Board in support of his application under Exec. Law § 632-a(8) to obtain his agency's ten percent commission fee. JA 115-118. However, in this proceeding, petitioners' affiants explain very differently the manner in which the publication of *Wiseguy* came about. *Compare* Petitioner's Brief ("Pet. Br.") at 6-7; *see* Korda aff. ¶¶ 4-6, JA 18-19. This dispute was identified by respondents in their district court papers. JA 107-108, ¶ 39. The lower courts did not attempt to resolve the inconsistencies in the differing versions provided by petitioner's affiants as to how *Wiseguy* was commissioned.

JA 56-57. According to the publishing agreement, Hill could receive and retain all his advances and royalties only if the manuscript was delivered in a timely fashion (unless the Publisher agreed to extend the date), JA 71, ¶ 78(a),[18] and the Publisher, in its sole editorial judgment, determined that the work was satisfactory. JA 72, ¶ 78(b).

Wiseguy: *Life In A Mafia Family*, was published in 1985. JA 51, ¶ 10. The story dates from 1955 when, at the age of eleven, Hill became involved in organized crime. *Id.*, ¶ 11. In *Wiseguy*, Hill describes in great detail "countless . . . infamous crimes," he committed as well as those he helped others to commit. JA 4, ¶ 12. Later the book became the basis for the motion picture entitled "Goodfellas".

In January 1986, the Board learned for the first time of the contract between Simon & Schuster, Pileggi and Hill for the publication of *Wiseguy*. JA 51, ¶ 12. The Board's counsel advised Simon & Schuster and Pileggi that they may have contracted with a criminal. He requested a copy of all contracts and other relevant information which are subject to the statute and asked that payments on any contracts which may be covered by the law be suspended. JA 86-87. After discussions, the Board's request was narrowed to matters involving *Wiseguy*. JA 15, ¶ 8.[19] On May 22, 1986, in response to a subpoena issued by the Board, Simon & Schuster furnished the Board with relevant documents concerning *Wiseguy* and advised the Board that it had paid the Sterling Lord Agency on behalf of Hill advances and royalties of $96,250. JA 90-91. Simon & Schuster also agreed to the Board's request to suspend future payments of all sums due Hill (JA 15, ¶ 8), including $27,958 being held at the time. JA 52, ¶ 16.

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18 Lord requested and received from the Publisher an extension of time to deliver the completed manuscript, first to June 1, 1983 and then to January 31, 1984. (Court of Appeals Appendix (["CA App."] 170-171)

19 The Board's initial request sought material beyond *Wiseguy* because the Board was concerned that Simon & Schuster was disregarding the statute. Petitioner attacks the Board's "sweeping demand" made by letter but fails to point out that the request was narrowed to matters involving *Wiseguy* and that Simon & Schuster complied with this narrow request only after a narrowly drawn subpoena was issued by the Board. *Compare* Pet. Br. at 8-9.

III. The Administrative Proceedings

After reviewing the contract and related documents and the book, the Board issued a Proposed Determination and Order, dated May 21, 1987, finding that the contract and book are covered by Exec. Law § 632-a because *Wiseguy* contains Hill's admissions to involvement in various crimes as well as Hill's discussion of those crimes and that Simon & Schuster violated the law by failing to turn over the contract and by paying money to Lord on behalf of Hill. JA 52-53. The Board determined that all money owed to Hill under the contract must be turned over to the Board to be held in escrow for the victims of the crimes committed by Hill. JA 53, ¶ 4. In addition, Hill was ordered to turn over to the Board the money already paid to him under the contract ($96,250 less any agent fees) and Simon & Schuster and the Sterling Lord Agency were ordered, in the event Hill failed to return the money, to turn over the money they wrongfully distributed to Hill. JA 53-54. Pileggi was determined under Exec. Law § 632-a(1) to be a co-author and not a representative of Hill and, therefore, he was entitled to retain all of the proceeds due him under the contract. JA 53, ¶ 3.

Under the Board's rules, 9 New York Code of Rules and Regulations ("NYCRR") 526.1, all parties had thirty days to request a hearing and to submit objections to the Proposed Determination and Order. JA 49; 101, ¶ 10. Simon & Schuster and Hill did not object. JA 106, ¶ 35; *see also* JA 15, ¶ 9. Hill's literary agent, Lord, objected and sought, pursuant to Exec. Law § 632-a(8), to retain his ten percent literary fee as provided for in the agreement. JA 106, ¶ 34. On October 19, 1988, the Board issued its Final Determination and Order and granted the literary agent's application. The Board's determination with respect to Simon & Schuster and Hill also became final at that time. 9 NYCRR 526.1. *Compare* Pet. Br. at 9, n.9. Because of the pendency of this action, the Board has not yet taken custody of any sums.

IV. District Court Proceedings

Petitioner commenced this action on August 3, 1987 seeking an order declaring the statute unconstitutional on its face and as applied under the First and Fourteenth Amendments, an injunction prohibiting respondents from taking any steps to apply or enforce it and an award of costs and attorney's fees pursuant to 42 U.S.C. § 1988. JA 1-9. After respondents answered the complaint, JA 10-11, petitioner moved for summary judgment under Federal Rules of Civil Procedure ("FRCP") 56. JA 12.

In support of its motion, petitioner submitted affidavits by publishing executives, publishing counsels, Pileggi and Lord. The affiants explained that authors and primary sources seek secure promises of timely payment and asserted that the statute therefore discourages speech because it restricts the publishing industry's "common practice" (JA 14, ¶ 7) of directly compensating such persons. JA 13-47. However, the only examples in the record suggesting that criminals may have been discouraged from speaking as a result of the statute are mentioned by Pileggi who states that he has "had to reject three separate projects which I would have undertaken or pursued. . . ." JA 27, ¶ 10; *see also* JA 28, ¶¶ 11-12. Only one affiant, the Editor-in-Chief of Time, Inc., directly mentioned the possible deterrent effect of the statute outside book publishing, but gave no examples showing that the statute had inhibited news magazines from publishing stories about criminals.[20]

A number of the executives stated that they would decline to enter into contracts with criminals in order to avoid the

20 *See* McManus decl. ¶ 3, JA 42 ("[the statute's] scope clearly involves magazine publishers just as substantially. While our regular reporting of alleged criminal activity of course involves no contracts with or payments to alleged criminals, there could arise situations where a full account of the criminal activity or, often more significant, the perspective of the alleged criminal concerning his motivation or the background of his activity can only be obtained by dealing with the individual most directly involved.")

reach of the statute. *See, e.g.*, Korda aff. ¶ 12, JA 21;[21] Grann aff. ¶ 4, JA 45-46. The publishers also complained that the statute may cause them to excise material concerning discussion of crimes from manuscripts in order to avoid interference by the Board with their contracts and payments to criminals. However, only one publisher identified a single instance in which discussion of a crime had been "restrict[ed]."[22] The affiants could not and did not state that the statute prohibits them from publishing books by criminals, compels them to delete material from any manuscript or bars them from earning all of *their* profits, but rather that they have *chosen* to take certain steps to avoid any involvement with the law. Finally, the publishing executives gave examples of books they believe would not have been written if the statute had been in effect when the book was published.[23]

The record does not contain any submission by Hill or any submissions by other criminals stating that they have been unable or unwilling to speak or to cooperate in a project as a result of the statute. Petitioner states tha "Hill was willing

21 Simon & Schuster's Editor-in-Chief stated that he would make it his practice to reject any book that would entangle Simon & Schuster in the statute's net and that he explained to his editorial board that Simon & Schuster could not consider a book on the so-called "preppy murderer" if Robert Chambers would be participating. *Id. Compare* Pet. Br. at 11 ("Simon & Schuster too has in fact rejected certain book projects because the law would apply.") Although Simon & Schuster declined to publish a book if Chambers would be participating, it was reported that Chambers' lawyer received more than 100 offers for movies or television films. *Mass Media Murder Mania*, Wash. Post, Sept. 22, 1986 at C2, col 1; *see also* Brown, *Murder Most Glamorized*, L.A. Times, April 2, 1989, (Calendar), at 18.

22 Grann aff. ¶ 7, JA 47 ("Our caution in the editorial process is illustrated by a recent book by a celebrity who had been convicted of a crime. We felt compelled to severely restrict any discussion of the crime in order to avoid the snare of another state's Son-of-Sam law."); *see also*, McManus aff. ¶ 4, JA 43; Korda aff. ¶¶ 14-15, JA 22; McNamara aff. ¶ 12, JA 16.

23 *See* Korda aff. ¶ 11, JA 21; Lord aff. ¶ 12, JA 32; Hollingsworth aff. ¶ 5, JA 35; Grann decl. ¶ 5, JA 46. *Compare Okuda, Criminal Antiprofit Laws, supra* p. 8, at 1364 and n.71 (discussing books written and published in New York since section 632-a was enacted).

to cooperate only if he were compensated for the hundreds of hours Pileggi would require him to devote to the project." Pet. Br. at 7; *see also id.* at 13.[24] However, under the publishing agreement Hill's compensation depended upon Simon & Schuster's acceptance of the manuscript. JA 72, ¶ 78(b). Indeed, it is unclear from the record whether Hill would have refused to cooperate if Simon & Schuster had properly advised him that it must turn over any payments to the Board to be held in escrow. *See* Petromelis aff. ¶¶ 37-46, JA 107-109.[25] As the district court found: "[B]ecause Simon & Schuster failed to comply with section 632-a by presenting its contract with Pileggi and Hill to the Board before making payments to Hill, we will never know whether or not Hill would have cooperated." 724 F. Supp. at 176 (36a [footnote omitted]).[26]

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24 *See* Korda aff. ¶ 7, JA 19 ("Hill's attorney made it clear that Hill's cooperation was dependant on his being paid for his time and effort."); Pileggi aff. ¶ 5, JA 26 ("Given the substantial investment of time that I required from [Hill], he would not have agreed to assist my work without compensation. He made this plain to me in the negotiations between us about what portion of the book's proceeds would be his.")

25 Hill appeared in 1986 on the ABC TV news program 20/20 to discuss his career in organized crime. JA 123. In 1987, after a Martin Lewis of Redmond, Washington was arrested on drug charges, Lewis' neighbors told reporters that he had bragged for years that he was really Henry Hill of *Wiseguy* fame "and about how rich and famous he is going to be" (JA 119), and, therefore, his arrest came as no surprise to them. JA 108-109, ¶ 40(b); *see also* JA 119-122. Hill also appeared on the television program Inside Edition on October 3, 1990 (*see* Newsday, Oct. 5, 1990, at 8), in which he discussed his crimes and the accuracy with which the film "Goodfellas" depicted his crime family life. The $1200 fee for Hill's television appearance is currently in an escrow account maintained by the Board for the sake of his victims.

26 The court of appeals found that "[t]here seems to be no question that Hill would not have agreed to participate in the project without the assurance he would be paid." 916 F.2d at 779 (6a). That finding, however, is at odds with the district court's finding which was not in error given the omission of an affidavit by Hill, the three year delay in his receipt of any payments (JA 90) and the evidence submitted by the Board concerning Hill's interest in publicity. *See* Petromelis aff. ¶ 40, JA 108-109; *see also* JA 119-

Respondents cross-moved for summary judgment pursuant to FRCP 56(b). JA 98. In their supporting papers, respondents disputed petitioner's statements that the statute will effectively deter most criminals from cooperating on projects and thereby prevent publishers from publishing works by criminal authors or primary sources. Petromelis aff. ¶¶ 36-38, JA 106-107. The Board's counsel noted that, as of October 27, 1988, there were ten pending administrative proceedings involving the statute. Felegy aff. ¶ 41, JA 137-138.[27]

124; CA App. 233-257. *Compare* Pet. Br. at 2-3 ("Absent those payments, the record shows without contradiction, the book would never have been written.") *See also id.* at 7.

27 As noted above, $118,000 was paid to Berkowitz's victims through his conservator. *See supra* note 13. Apart from the victims of Hill's crimes, the statute has benefited or will soon benefit victims in a number of cases. The Board has established escrow accounts or concluded administrative proceedings based on the following contracts: (1) the movie rights bought by Warner Bros. for the crime story of John Stanley Wojtowicz, the bank robber portrayed in the film "Dog Day Afternoon". *See Book Rights: Ethical Dilemma ["Book Rights"], Nat'l Law J., Aug. 24, 1981, 1, 12, col. 4. $90,000 has been escrowed thus far, and $75,000 has already been distributed to his victims; (2) the rights to the book My Return* by Jack Henry Abbott which includes a play based on his fatal stabbing of an aspiring actor, together with an option for a proposed movie based on Abbott's life, *see* N.Y.L.J., Oct. 22, 1987 at 1, col. 2. Three escrow accounts totaling over $16,000 are available and his victim's widow has obtained a judgment against Abbott; (3) a People magazine article, *The Man Who Shot John Lennon*, written with the assistance of Lennon's killer Mark David Chapman. Over $8,000 is escrowed; (4) a contract for the book *Power on Earth*, by Nick Tosches, written with the assistance of convicted felon Michelle Sindona, concerning his crimes involving the failure of Franklin National Bank—*see Book Set on Sindona, Italian Banker*, N.Y. Times, March 26, 1986 at C15, col. 4. Approximately $15,000 has been escrowed thus far and the Board has been notified of a judgment against Sindona arising from his crimes; and (5) the life story of Jean Harris, entitled *Stranger In Two Worlds*, bought by MacMillan, Inc. The Board's determination that the contract is subject to Exec. Law § 632-a and an advance of $100,000 must be escrowed for the benefit of her victim's estate was upheld in *Children of Bedford*, 1991 WL 70950. In addition, an escrow account was established based on a contract for the television movie rights to the crime story of Salvador Agron, the so-called

The Board's decision to hold money due Hill in escrow under the statute should benefit victims of Hill's crimes. For example, Patricia Eisenberg was married to William Bentvana a/k/a Billy Batts. On or about December 13, 1970, Mr. Bentvana disappeared. After reading *Wiseguy* some fifteen years later, Ms. Eisenberg learned for the first time that her husband had been murdered and that Hill had been an accessory to the murder. Ms. Eisenberg states: "Our sons and I have suffered financially and emotionally from the crime described by Henry Hill in his book, *Wiseguy*. We intend to make a claim individually and on behalf of my husband's estate for monies obtained by the New York Crime Victims Board." Eisenberg aff. ¶ 5, JA 125.

V. District Court Opinion

In its opinion dated October 24, 1989, the district court denied petitioner's motion for summary judgment, granted respondents' cross-motion for summary judgment and declared Exec. Law § 632-a to be constitutional under the First and Fourteenth Amendments. 724 F. Supp. at 180 (45a). At the outset, the court considered whether the statute directly restricts expressive activity or whether its effect on speech and the press is indirect. 724 F. Supp. at 175 (34a-35a). The court observed that freedom of speech "presupposes a willing speaker." *Id.* at 176 (35a). The court wrote: "[A]lthough it may be more difficult for publishers and authors to create books with the cooperation of a criminal source, it is not impossible nor is such cooperation proscribed by section 632-a. The statute merely diverts the criminal source's proceeds for a time to ensure that victims may be compensated. *See Children of Bedford*, 541 N.Y.S.2d at 899." *Id.* (36a).

The district court therefore concluded that § 632-a has only an incidental effect on speech activities. *Id.* at 177 (38a).

"Capeman" murderer, but the funds were returned to the criminal, pursuant to Exec. Law § 632-a(4), when no victim claimed the funds. *See Book Rights*, Nat'l. Law J. at 12, col. 4. *Compare* Pet. Br. at 13, n.11 and 31.

Applying the test for incidental limitations on First Amendment freedoms (*id.* at 177-179 [41a-42a]), the court determined that New York's interest in ensuring that criminals do not profit from their crime before their victims have an opportunity to be compensated is substantial and that the interest is unrelated to suppression of expression. The court also concluded that any restriction on speech is no greater than is essential to promote the government's interest in compensating crime victims because the law "is drawn not to prohibit expressive activities but to garnish the proceeds so that they will be used in a productive manner. . . . The statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from directly profiting from his or her crime." *Id.* at 179 (41a-42a).[28]

VI. Court of Appeals Decision

A divided panel of the Second Circuit affirmed the district court's judgment dismissing the complaint (JA 126), but on different grounds. The majority decided that section 632-a must survive strict scrutiny to be found constitutional because "the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes" since "[w]ithout a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write." 916 F.2d at 781 (11a). The majority also found that the statute singles out the media for differential treatment based on expressive content. *Id.* at 782 (12a-13a).

The court of appeals then determined that the state had met its burden of showing that Exec. Law § 632-a is necessary to serve a compelling state interest. The majority found that New York has a compelling interest "in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation

28 The district court also rejected petitioner's contention that the statute violates the due process clause because it is overbroad and vague. The court found that the statute provides fair notice to those to whom it applies and clear standards for compliance. *Id.* at 179-180 (42a-44a). *Petitioner abandoned this claim in its appeal to the Second Circuit.* 916 F.2d at 781 (10a). *See also Children of Bedford*, 1991 WL 70950 at pp. 20-21 (holding section 632-a is not void for vagueness).

by reason of their victimization." *Id.* (13a-14a). The court of appeals further reasoned that the statute is necessary to serve that interest because it "assure[s] that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited." *Id.* at 783 (15a).

Finally, the majority determined that the statute is narrowly tailored to achieve the state's compelling interest because it recognizes that the only way a criminal can profit from a specific crime involving a specific victim, apart from obtaining any proceeds of the crime itself, is to tell (and sell) the story of the crime and that the sole asset of most criminals is the right to tell the story of their crimes. *Id.* (15a).[29]

SUMMARY OF ARGUMENT

1. "Freedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). Exec. Law § 632-a on its face, and as applied to *Wiseguy*, does not directly or substantially burden free speech since the statute does not prevent a willing criminal from speaking. This statute only interferes with speech when a criminal chooses not to speak in order to avoid the attachment of his profits.

2. Exec. Law § 632-a on its face, and as applied to *Wiseguy*, does not substantially or directly interfere with the media's ability to publish or to make a profit. The media in this case is the means by which the criminal speaks. The statute imposes some minor administrative requirements on entities contracting with criminals but it does not prevent the media from profiting or from disseminating the willing criminal's speech. The fact that criminals are paid for speaking by the media does not change the protections afforded to the press by the First Amendment.

29 The dissenting judge agreed that the statute directly burdens speech and should be held to a heightened standard of review. *Id.* at 784 (19a). However, he concluded that the state's interest in victim compensation was not served by the statute in a manner narrowly tailored to achieve that end because, in his view, the statute was both under and over-inclusive. *Id.* at 785-787 (21a-25a).

3. There is no evidence in this record that willing criminals have been deterred from speaking by this statute. In fact, the record shows that criminals continue to speak about their crimes. Moreover, certain criminals who wish to profit from speaking will continue to speak about their crimes, and the financial incentives in the statute encourage such speech. The statute must therefore be sustained where, as here, petitioner has failed to show that the statute will deter speech in a significant respect.

4. Exec. Law § 632-a does not target the press for differential regulation which burdens its ability to publish. Differential regulation of the press raises substantial First Amendment concerns when the press is targeted in a manner that suggests an effort to suppress publication. This statute does not prevent the press from publishing or from profiting when it disseminates the criminal's message. Moreover, Exec. Law § 632-a is also directed at any entity that contracts with a criminal for speech about his crime, and, therefore, it does not target a special or small segment of the press for differential treatment.

5. Although Exec. Law § 632-a applies only when a criminal is paid money to tell his crime story, the law is content-neutral and not speaker-based because it does not prohibit or limit the criminal's discussion of crimes or the criminal's point of view about them. Section 632-a is also justified without reference to the content of the criminal's speech because its purpose is to ensure that a criminal does not profit from selling his crime story before his victims have a meaningful opportunity to be compensated for their injury and suffering.

6. Because the statute is directed only at a financial incentive to speak and not at speech itself, the statute affects speech only indirectly and in an insubstantial manner. The statute must, therefore, be judged under the standards for incidental burdens on speech set forth in *United States v.*

O'Brien, 391 U.S. 367 (1968). Under the *O'Brien* test, the statute survives scrutiny because (i) New York has the authority to enact a law which attaches the profits of criminals for the benefit of their victims; (ii) the statute furthers New York's substantial interest that criminals not profit from their crimes before their victims are compensated; (iii) New York's interest is unrelated to the suppression of speech; and (iv) the statute is an effective means of allowing victims of crimes publicized in the media to be compensated for their injuries and suffering before the criminal profits from his crime.

7. Even if the statute imposes a direct or substantial burden on speech or the press, Exec. Law § 632-a survives strict scrutiny because it is necessary to achieve New York's compelling interest since it provides the most effective means of ensuring that crime victims are compensated whenever the criminal profits from telling the story of his crime. The statute is also narrowly tailored to achieve New York's compelling interest as it targets only the criminal's profit from his crime and not his speech. The statute is neither under-inclusive nor over-inclusive because "[t]he reach of the law is limited to its purpose." *Children of Bedford*, 1991 WL 70950 at 20.

ARGUMENT

EXEC. LAW § 632-a DOES NOT VIOLATE THE FIRST AMENDMENT ON ITS FACE OR AS APPLIED TO *WISEGUY*

A. Exec. Law § 632-a Does Not Directly Or Substantially Burden Free Speech Or Publication Since, Under The Statute, Criminals Who Choose To Speak And Entities Who Wish To Disseminate The Criminal's Message Are Not Prohibited From Doing So

The First Amendment does not prevent government from enacting a law which may affect a speaker's incentive to speak. Indeed, general tax laws and attachment statutes,

which petitioner concedes are constitutional (*see* Pet. Br. at 28-29 and JA 36, ¶ 9), reduce a speaker's financial incentive to speak. Rather, the First Amendment prohibits government from enacting a law which unduly interferes with a criminal's right to speak, a criminal's means of communicating his message or the public's right to hear the criminal's message. *See generally*, *Virginia State Board of Pharmacy*, 425 U.S. at 756 ("the protection afforded is to the communication, to its source and to its recipients both.") Exec. Law § 632-a does not directly or substantially burden freedom of speech or the press because it does not prevent the criminal from freely and fully expressing his thoughts and ideas or inhibit the media from communicating those thoughts and ideas to the public. In fact, the record demonstrates that, despite the statute, criminal speakers continue to express their point of view about their crimes and the media continues to disseminate the criminal's message.

1. Exec. Law § 632-a Does Not Prevent Criminals From Freely Expressing Their Thoughts And Ideas.

" 'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . .' " *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 559 (1985), *quoting Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255, 296 N.Y.S.2d 771, 778 (1968) (emphasis in original). A law which only affects a person's incentive to speak, however, is not directed at the *voluntary* expression of ideas and does not raise substantial First Amendment concerns unless it is aimed at suppressing speech itself. This is because "[f]reedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy*, 425 U.S. at 756. A willing speaker is a person who desires to communicate his ideas and beliefs to an audience interested in hearing them. A person who speaks only upon receipt of a financial incentive cannot be considered a voluntary or willing speaker.

Exec. Law § 632-a on its face, and as applied in this case to *Wiseguy*, does not prevent a willing speaker from fully expressing his thoughts and ideas to others. The statute,

> does not prohibit a person convicted or accused of a crime from engaging in conduct designed to communicate the details of the crime or his thoughts and feelings about its commission or about the resulting prosecution and trial. Nor does the law prohibit any segment of the press from functioning as the instrument for the communication of such information to the public or from reaping a financial benefit from performance of that function. The statute affects only the rights of the perpetrator to receive any profit from communications concerning the crime unless and until all proceeds have been held in escrow for five years and made available to satisfy any civil judgment obtained against the wrongdoer.

Children of Bedford (Sup. Ct. N.Y. Co.), 541 N.Y.S.2d at 898-899.

Thus, the statute interferes with the expression of the criminal's ideas only when the criminal chooses not to speak because his profits will be held in escrow for the benefit of his victims. *See also Fasching v. Kallinger*, No. L 069197-83 (N.J. Super. Ct. Law Div. July 24, 1985), *slip op.* at 33 ("If the criminal wishes to speak to the members of the press, he will speak regardless of any monetary incentives.") (citation omitted).[30] The statute did not interfere with Hill's speech since he cooperated with Pileggi. Even if Hill would not have spoken because he wanted his profits immediately, that decision would have been his to make and not one mandated by the statute.

As one commentator has aptly stated:

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30 This challenge to the New Jersey Son of Sam statute involved the profits from the book *The Shoemaker*. A lower court upheld the statute under the First Amendment, but an appellate court reversed the lower court's decision on statutory grounds and did not reach the constitutional issue. 510 A.2d 694, 696, 702-704 (Super. Ct. App. Div. 1986). (A copy of the unpublished lower court decision was appended to respondents' brief in the Second Circuit).

> The argument that the [New York] statute[ ] violate[s] the first amendment because [it] deter[s] the offender from publishing the story of his crime centers on the withdrawal of the proceeds as the source of the deterrent effect. This does not, however, allege the affirmative assertion of a barrier to his expression but rather involves the withdrawal of an incentive for him to express himself. The publishers who are willing to pay him for his story would be equally if not more willing to accept his statements free of charge. The payments to the offender induce him to tell his story but do not relate to the willingness of publishers to print it. . . . The argument against these statutes seems to presuppose an *unwilling* speaker who must be induced to communicate by monetary payments.

Comment, *In Cold Type*, *supra* note 11, at 261-262 (emphasis in original).

In several decisions, this Court has recognized that the Constitution does not provide special protections to people who are discouraged from exercising their constitutional right to speak by the government's withdrawal of or refusal to provide a financial incentive to speak which is not aimed at suppressing speech. First, the Court has rejected challenges under the First Amendment to provisions in federal tax laws and government benefit programs that reduced the amount of money people had to spend which in turn could reduce their incentive to fully exercise their First Amendment right to speak. *See Lyng v. Int'l Union*, 485 U.S. 360, 369 (1988) (denial of food stamp benefits to families who apply for such benefits where a member is on strike and denial of an increase in a current recipient family's food stamp allotment when a member goes on strike); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) (denial of a tax deduction for contributions based upon the nature of an organization's lobbying activities); *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (same).

Second, the Court has extended this principle in a challenge to a federal forfeiture statute which restrains a criminal

defendant's money. Specifically, the Court held that orders restraining and then forfeiting a criminal defendant's assets under the Comprehensive Forfeiture Act of 1984 did not substantially burden a criminal defendant's Sixth Amendment right to counsel of choice. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). The Court reasoned that even where assets subject to forfeiture are restrained, a criminal defendant was not necessarily prevented from retaining an attorney of his choosing. *Id.* at 625. The Court specifically recognized that denying an exception to the forfeiture statute for a criminal defendant's right to counsel of his choice would also properly mean that a criminal defendant could not assert a First Amendment exception to the forfeiture statute: "If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal . . . Nonetheless, we are not about to recognize an antiforfeiture exception for the exercise of each such right. . . ." *Id.* at 628.

These decisions illustrate that a law which affects a speaker's financial incentive to speak but does not prevent him from communicating his thoughts and ideas, does not directly or substantially burden speech. *Caplin & Drysdale* demonstrates that this principle applies even where a law *restrains* a person's assets but it does not *prevent* the exercise of the underlying right.

Section 632-a is similar to the laws at issue in these cases since it only attaches a criminal's asset in order to preserve the victim's equitable right to it, but it does not *prevent* a criminal from communicating his thoughts and ideas. In addition, the statute is aimed at the criminal's profits and is not directed at his speech nor does it operate in a manner to suppress speech. *Accord St. Martin's Press v. Zweibel* (Sup. Ct. N.Y. Co.), N.Y.L.J., Feb. 26, 1990, p. 25, cols. 1, 5-6 (involving R. Foster Winan's book *Trading Secrets*) ("Freedom of speech does not guarantee a criminal's right to maximize profits in return for selling his story to the media and

the mere fact that the criminal may not immediately profit from such expressive activity does not prevent such speech.")

Since the statute is only directed at the profits paid by some entity to a criminal speaker under a contract, and is not directed at speech or publication, the statute only burdens the criminal's speech indirectly whenever a criminal chooses not to speak because of the statute. For the reasons discussed above, this indirect burden on speech is also insubstantial. "[E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend . . . [on protected activities], yet no one would suggest that such liability gives rise to a valid First Amendment claim." *Arcara v. Cloud Books Inc.*, 478 U.S. 697, 706 (1986). Accordingly, the statute must be judged under the balancing test that is set forth in *United States v. O'Brien*, 391 U.S. 367, *see infra* pp. 39-45, for laws which impose an incidental burden on speech.[31]

2. Exec. Law § 632-a Does Not Prohibit The Media From Communicating The Criminal's Message To The Public Or From Profiting From Performing That Function.

The media in this case is the means by which the criminal communicates his message to others, and the media's ability to carry out this function is not infringed by the statute. Once a criminal is willing to have his story disseminated, the statute only interferes with its transmission when the media chooses not to disseminate the criminal's story to avoid any

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31 The *O'Brien* test would not apply if a law were directed at a speaker's profits for the purpose of suppressing speech. *See, e.g., Cammarano*, 358 U.S. at 498, quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958) ("Nondiscriminatory denial of [tax] deduction is plainly not 'aimed at the suppression of dangerous ideas.' ") In that case, the law would be subject to strict scrutiny review. *Compare Texas v. Johnson*, 491 U.S. 397, 406-407 (1989) (state *interest* must be unrelated to speech to come within purview of *O'Brien*). Here, the interest of section 632-a is unrelated to speech because the statute is directed only at the criminal's profits from his crime in order to assist the victims of his crime.

involvement with the Board or chooses to edit material from a story in order to avoid the reach of the statute. The minor and narrowly circumscribed administrative burdens the statute imposes on all entities that contract with criminals concerning their crime story—the obligation to turn over covered contracts to the Board and to pay money to the Board instead of to the criminal (Exec. Law § 632-a[1])—do not significantly interfere with the media's ability to disseminate the criminal's message. *Accord Children of Bedford*, 1991 WL 70950 at 18-19.

Petitioner argues that Exec. Law § 632-a constitutes a substantial burden on speech and publication because "[s]tatutory restrictions on expenditures for speech" (Pet. Br. at 17) are direct restrictions on speech itself. In petitioner's view, this statute constitutes such a restriction because it is a "prohibition on making payments [by publishers to authors and primary sources] deemed necessary for speech. . . ." *Id.* at 18.

Petitioner's argument does not apply to what in fact occurred to Hill. The statute did not interfere with Simon & Schuster's dissemination of Hill's message since the statute did not prevent petitioner from publishing *Wiseguy*. However, as has been shown above, even if Hill had declined to speak, laws which limit the speaker's financial incentive to speak do not directly or substantially burden the First Amendment.

The fact that the money is owed to the criminal by the *media* does not change the result. The cases petitioner relies upon stand only for the proposition that a statutory restriction on expenditures for speech will directly interfere with speech when it limits or reduces the speaker's *means* of communicating his message to others. When a speaker's means of communication are infringed, the speaker can not fully disseminate his message to his audience. It is the speaker's *message* which the First Amendment protects and his *ability* to convey that message to his audience, *not* the speaker's ability to *maximize his own profits*. The First Amendment does not protect the media's right to convey the speaker's message if

the speaker is unwilling to speak because his financial condition is not being met.[32]

Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*) addressed, *inter alia*, the expenditure ceilings in the Federal Election Campaign Act. In striking down these ceilings, the Court recognized "[t]he electorate's increasing dependence on . . . mass media for news and information" so that "virtually every *means* of communicating [political] ideas in today's mass society requires the expenditure of money." *Id.* at 19 (emphasis added). Accordingly, by limiting how much money could be spent in a national campaign, Congress had imposed a *direct* impediment upon the speakers' *means* of communicating their message.

Similarly, in *Meyer v. Grant*, 486 U.S. 414 (1988) (Pet. Br. at 18), Colorado made it a crime for the proponent of an initiative petition to pay petition circulators. The petition circulators were the *means* by which the proponents' ideas were being communicated to the public. If the circulators could not be paid, the proponents' message could be communicated by volunteers, but "the available pool of circulators [was] necessarily smaller if only volunteers can be used." *Id.* at 419. The Court held that "[t]he refusal to permit [the proponents] to pay petition circulators . . . makes it less likely that [the proponents] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id.*

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32 In support of its argument that the restriction of payment for speech necessarily and unconstitutionally restricts speech, petitioner also cites to copyright cases. Pet. Br. at 20, citing, *e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. at 558 ("copyright supplies the economic incentive to create and disseminate ideas.") The Constitution, art. I, § 8, cl. 8 allows Congress to enact a copyright law but does not confer a constitutional right to copyright. *See, e.g.*, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) ("the protection given to copyrights is wholly statutory"). *See also* H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909) ("The Constitution does not establish copyrights . . . .") Moreover, the copyright law protects an author's right to control the use of his expression, but does not protect his profits from taxation or attachment. *See Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (copyright royalties are not immune from state taxation).

at 422-423. In addition, "Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Id.* at 424.

In cases involving charities (Pet. Br. at 18-19 and n.15), the Court recognized that charities often use professional fundraisers to disseminate their message as well as solicit funds and that laws that restricted the "amount a charity can spend in fund-raising activity" substantially restricted the charities' *means* of spreading its message and, therefore, were "a direct restriction on protected First Amendment activity. . . ." *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. at 967 and n.16, *citing Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 635-636 (1980). For example, in *Joseph H. Munson Co.*, the statute at issue forbade contracts between charities and professional fundraisers if, after allowing for a deduction of costs associated with solicitation, the fundraisers retained more than 25% of the money collected. By preventing certain charities from using fundraisers where their fees were deemed to be unreasonable, the statute inhibited the charities' *means* of communicating their ideas and messages to the public and, therefore, directly interfered with their ability to speak.

In none of the political speech and charitable solicitation cases did the Court address the speaker's incentive to speak through the payment of money. In each case, the Court discussed the impact of the statute on the speaker's *ability* to disseminate his message. Thus, the principles enunciated in these cases do not apply to section 632-a since, under this statute, the press is the means by which the criminal speaks and, by forbidding the press from immediately paying the criminal his profits, the statute does *not* limit the *press's ability* to publish or profit.

3. Petitioner Has Failed To Produce Any Evidence That Exec. Law § 632-a Prevents Willing Speakers From Expressing Thoughts And Ideas Or The Media From Communicating Their Message To The Public Or That The Statute Will Deter Speech In A Significant Respect.

The record in this case does not show that Exec. Law § 632-a has prevented any willing speaker from expressing his thoughts or ideas or any publisher from communicating the criminal's message to the public. Indeed, it could not. The statute is specifically designed to avoid infringing on freedom of speech or the press. In fact, although theoretically some criminals will not speak about their crime if they are not immediately paid, the record in this case does not show that the statute has deterred any criminal from speaking and that it will have a substantial impact on the number of criminal speakers or the content of their speech.

There are many reasons, besides money, which motivate criminals to speak. For example, Charles Manson spent "hundreds of hours" telling his life story and crime story. "And although it is his story, Charles Manson receives no royalties or any other remuneration from [the] book. His only recompense will be the chance to have his story heard." N. Emmons, *Manson: In His Own Words*, 15, 17 (1986). The record suggests that Hill wanted to tell his story and that he might have spoken even if he could not be paid immediately or guaranteed his profits. *See supra* note 25.[33] There are also many other examples of criminals wishing to tell their crime story without regard to their own profit.[34]

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33 Hill was not even paid his first advance until October 10, 1984 (JA 90), more than three years after the publishing agreement was entered into and he was to receive his first advance (JA 56, ¶ Second [C]), and more than eight months after the extended deadline for delivery of the completed manuscript. CA App. 171.

34 *See e.g.*, Snider, *COMING SOON to a Theater Near You*, 7 Cal. Law. 29, 31-32 (1987) (" 'Accomplished writers spending a year or two or three on a single book, like Peter Maas or Gay Talese, have proven to the world that you don't have to pay these [criminals]—they'll tell you anyway, if you're a hardworking, honest journalist.' " [*quoting* Stein, Deputy Direc-

Prison inmates are also motivated to write in response to their crime and their confinement. Franklin, the author of *Prison Literature in America* (1989), *see* Pet. Br. at 37, n.29, writes: "[T]he earliest literature by convicted American criminals of which I am aware is purely confessional" (*id.* at 127); contemporary works by American prisoners are often written by " 'common' criminals . . . who became authors because of what they learned in prison." *Id.* at 181. Another commentator adds:

> There is another form of 'writing your way out of prison', . . . and that is the growing number of prison inmates who write, with instruction, as part of their rehabilitation. Writing contributes to a process of internal growth and acceptance of responsibility, many professionals believe, although it may not help ex-inmates to make a living, or make a statement.

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tor of the National Organization for Victim Assistance]); Lieberman and Stewart, *Making Money Off Murder*, Student Law., Feb. 1982, at 41, quoting Lawrence Schiller, who negotiated the rights to the story of Gary Gilmore ("The simple fact is that money in such cases [of notorious criminals] is rarely important to the people whose story may be of value, the perpetrators of celebrated crimes. . . . 'Now their lawyers do it for the money and their agents do it for the money. But they are in the state of mind where the enormity of what they did has altered their perceptions on everything.' "); *Donald Harvey: Pitiless Killer*, The Columbus Dispatch, March 17, 1991 at 4F (jailhouse interview with Ohio's "most prolific murderer" discussing his serial killings); *State Invokes 'Son of Sam' Law*, St. Petersburg Times, March 12, 1991 at 6B (discussing lawsuit against convicted spouse-killer Edythe Robinson for the profits from her book, *A Long Lonely Time*—" 'My intention for writing the book was to find out who killed my husband', said Mrs. Robinson"); Nichols, '*What the Hell's a Guy Gonna Do*?', U.S.A. Today, Jan. 9-11, 1987, at 1A, col. 3, 2A col. 1 ("[convicted criminal Roswell] Gilbert [TV movie *Mercy or Murder*?] is not interested in money. He wants only to be vindicated. 'They couldn't accept the fact that I did what I did for a damn good reason,' he says."); Mark David Chapman [*see supra* note 27] entered into a contract in which he agreed that he did not wish to profit from his crime story. *In the Matter of a Contract between Mark David Chapman et al.*, Final Determination and Order (New York State Crime Victims Board), May 26, 1989.

Israel, *Jack Henry Abbott, American Prison Writing, and the Experience of Punishment*, 10 Crim. Just. & Behav. 441, 450 (1983).

Even some criminals who wish to be paid for speaking will be encouraged to speak by the incentives in New York's statute. *See* discussion above at p. 7. Petitioner argues that since the criminal cannot receive his profits for many years, the statute necessarily deters authors who must devote years to writing to speak. Pet. Br. at 10. However, "[w]hile authors may generally rely on contract advances to cover their research and other preliminary expenses, the criminal has no similar need for funds in advance of publication, because he typically sells only his rights to his story, not his services as author. In practice, a paid ghostwriter commonly pens the criminal's story." Okuda, *Criminal Antiprofits Law*, *supra* p. 8, at 1365 (footnotes omitted).

Petitioner asserts that its record of "[u]ndisputed affidavits containing specific examples of works that have not been published at all and of works that have been bowdlerized," cannot be dismissed as " 'conjectural' or 'speculative.' " Pet. Br. at 19. The record, however, contains no statement by any criminal speaker and only a few references to *criminals* being discouraged from speaking. *See* JA 21, 27-28, 45-46 and discussion above at pp. 14-16. On the other hand, the record and examples from the public record demonstrate that since New York's law was enacted, books, newspaper and magazine articles written by or with the cooperation of criminals about their crimes have been published and criminals have discussed their crime story in other media contexts as well. JA 137-138, ¶ 41 and discussion at notes 10, 11, 12, 23, 25 and 27.

In light of this record, it is clear that the statute will not deter a willing criminal from speaking and "the inhibiting effect" of the statute on those criminals who wish to be paid for speaking and on the media's willingness to disseminate the criminals' message "are . . . to a great extent speculative." *Branzburg v. Hayes*, 408 U.S. 665, 693-694 (1972) (footnote omitted). Petitioner can not, therefore, satisfy its burden of demonstrating that the statute is invalid on its

face. It is well-established that to prevail on its facial challenge on First Amendment grounds, petitioner "*must* demonstrate that the challenged law . . . 'could never be applied in a valid manner' . . . ." *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988), *quoting Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (emphasis added); *see also Joseph H. Munson Co.*, 467 U.S. at 967-968 and cases cited therein. Petitioner has not only failed to show the extent to which criminals who wish to be paid will be deterred from cooperating in book projects, but it has also failed to show that the statute substantially deters speech in all its applications.

B. Exec. Law § 632-a Does Not Single Out Or Impose A Differential Burden On The Press Since The Statute Is Directed At Any Entity That Contracts With A Criminal And It Does Not Prevent Such Entity From Disseminating The Criminal's Message

Petitioner argues that Exec. Law § 632-a violates the First Amendment because it imposes a "differential regulation" on the press. Pet. Br. at 21. However, the cases striking down differential treatment of the press have been concerned with a specialized tax which "is directed at, or presents the danger of suppressing, particular ideas." *Leathers v. Medlock*, 59 U.S.L.W. 4281, 4285 (April 16, 1991). In this case the statute is neither directed at nor presents the danger of suppressing speech.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (Pet. Br. at 21-22), the Court considered whether Minnesota had the "power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers." *Id.* at 576. At issue in *Minneapolis Star* was a use tax on the cost of paper and ink products used in publishing newspapers which fell disproportionately on Minneapolis Star which paid roughly two-thirds of the revenue raised by the tax. *Id.* at 578. The Court observed that the First Amendment does not

prohibit general economic regulation of the press, including a general tax. *Id.* at 581, 583.

However, the Court also reasoned that "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression and such a goal is presumptively unconstitutional." *Id.* at 585. Because a tax on the press has the potential to inhibit, and ultimately, to prohibit publication, any differential tax places a substantial burden on the press (*id.*), and suggests an effort to "suppress the expression of particular ideas or viewpoints." *Leathers v. Medlock*, 59 U.S.L.W. at 4283. The Court struck down the specialized use tax in *Minneapolis Star* because it was not narrowly tailored to a compelling justification. *Id.* at 586-90.

In comparison, Exec. Law § 632-a is not a specialized tax directed at the press but is an attachment provision which only affects the criminal speaker's financial incentive to speak. Unlike a tax, section 632-a does not prevent the press from disseminating the willing speaker's message. Therefore, it does not operate in a manner that suggests an effort to suppress speech.

The Court in *Minneapolis Star* was also concerned that differential treatment of a small segment of the press suggests that the government's purpose is to restrict publication for those entities. *Id.* at 591-592; *see Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating a sales-tax scheme which targeted a small group within the press based upon content).[35] The statutes at issue in *Minneapolis Star* and *Arkansas Writers' Project* taxed a few newspapers and magazines, and therefore, had the effect of imposing "a penalty

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35 *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("The tax here involved [2% of gross receipts of periodicals with a circulation of more than 20,000 copies] . . . is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."); *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (" 'plain purpose' [of tax in *Grosjean*] . . . was to penalize the publishers and curtail the publication of a selected group of newspapers.")

for a few." *Minneapolis Star*, 460 U.S. at 592; *Arkansas Writers' Project*, 481 U.S. at 229, and n.4. On the other hand, a broad-based tax which does not single out a small segment of the media for differential treatment does not raise the same additional concerns. *Leathers v. Medlock*, 59 U.S.L.W. 4281 (upholding general sales tax that covers all cable television companies but exempts newspapers and subscription magazines).

Exec. Law § 632-a is similar in scope to the tax upheld in *Leathers* since it is not directed at the press alone, or even at the media alone, as it applies whenever criminals contract with *any entity*. Exec. Law § 632-a(1). The justification for singling out entities that contract with criminals for speech about their crime is the need to have an effective mechanism to ensure that the criminal's asset derived from his crime story is maintained for the victims of that crime. *See* discussion below at pp. 43-45.

C. Since Exec. Law § 632-a Does Not Limit A Criminal's Speech About His Crime, And Is Justified Without Reference To The Discussion Of The Crime, It Is Neither A Content-Based Nor Speaker-Based Prohibition Or Penalty On Speech

Contrary to petitioner's argument, Exec. Law § 632-a is neither a content-based nor speaker-based prohibition or penalty on speech. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Exec. Law § 632-a does not, in any way, prohibit or limit discussion of crimes or of the criminal's point of view about them. Moreover, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* The purpose of Exec. Law § 632-a is directed not at content but at ensuring that the criminal does not profit from his crime before his victims are compensated.

The cases cited by petitioner striking down content-based statutes are distinguishable from section 632-a because each of the laws challenged in those cases imposed a burden on speech or publication through a tax or prohibition of speech that was directly related to content. Pet. Br. at 23.[36] The statute in this case does not require the Board to "evaluate the nature of the message being imparted in order to enforce [it]." *Regan v. Time, Inc.*, 468 U.S. at 656. The Board makes no inquiry as to whether the subject matter is offensive or whether the point of view expressed is unpopular. *See e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *NAACP v. Button*, 371 U.S. 415, 444-45 (1963). The Board simply considers several objective factors to see if the statute applies to the money earned by a particular speaker with respect to a particular contract; it "does not employ a sliding scale to determine if the crime spoken of is more horrible than another." 724 F. Supp. at 178 (40a).

Moreover, section 632-a does not attempt to dictate the persons who may speak about crime. Any person may discuss the crime under this statute. The only constraint the law imposes is that the criminal speaker who chooses to reenact or discuss his crime may not profit before his victim. Therefore, the statute "does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views'. . . ." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48-49 (1986), quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. at 95-96. *See also Leathers v. Medlock*, 59 U.S.L.W. at 4285 (differential burden on speak-

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36 *See, e.g., Arkansas Writers' Project*, 481 U.S. 221 (magazines containing general interest articles were fully taxed while religious, professional, trade and sports journals were exempted); *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984) (photographic reproductions of currency prohibited but educational, historical or newsworthy reproductions exempted); *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 99-101 (1972) (prohibition for all peaceful picketing near school with an exception for picketing that involves a labor dispute).

ers does not raise First Amendment concerns unless it "presents the danger of suppressing, particular ideas."); *St. Martin's Press*, N.Y.L.J., Feb. 26, 1990 at 25, col. 5 ("The law is not speaker based as the criminal-author is free to state his viewpoint, whatever that may be.")[37]

Section 632-a is also a content-neutral statute because the statute is " '*justified* without reference to the content of the regulated speech.' " *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 48 [citations omitted] (emphasis in original). As this Court reiterated in *Ward v. Rock Against Racism*, 491 U.S. at 791: "The government's purpose is the controlling consideration." (*Renton* analysis applied to uphold New York City's sound-amplification guidelines at the Bandshell in Central Park). *Compare* Pet. Br. at 25 ("That decision [*City of Renton*] . . . has never been determinative in this Court in any subsequent case. . . .")

The Legislature's purpose in enacting section 632-a was to redistribute the criminal's profits from selling his crime story to his victims. The content of the criminal's speech was related to that justification only insofar as the Legislature determined that it was unjust to allow criminals to *profit* from storytelling about their *crimes* before their victims are compensated for their injury and suffering. *See* discussion above at pp. 8-9. The statute is, therefore, *justified* without reference to the content of the criminal's speech.[38] The *Renton* analysis is thus particularly appropriate here.

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37 In the speaker-based cases cited by petitioner (Pet. Br. at 23 and n.19), the Court invalidated statutes that violated the fundamental principle against speaker-based and content-based regulations because they prohibited dissemination of expressive activity and were content-related as well as speaker-based. *See e.g., FCC v. League of Women Voters*, 468 U.S. 364 (1984) (statute prohibited noncommercial educational broadcasting stations from editorializing); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785 (1978) (statute banned corporations from communicating their views to the public on certain referendum subjects).

38 Petitioner asserts that the Board has justified the statute based on its content by references in prior briefs to the effect of the criminal selling his story on his victims. Pet. Br. at 24. However, it is clear from the legislative history and the Board's prior discussion of that history that the second victimization theory is based upon the criminal *profiting* from discussion of the crime and not from discussion of the crime itself. *See, e.g.*, Board Reply Mem. in Support of Cross-Motion for Summary Judgment at 30-31, 34: "[c]rime victims and their families who suffer a second violation when a criminal *sells* the story of his crime to the media. . . ." (emphasis added); "[i]t is abhorrent to one's sense of justice and decency that an individual, such as [Son of Sam], can expect to receive *large sums of money* for his story." JA 102 (emphasis added). Nothing in the Board's statements were meant to suggest that the Legislature's justification for the statute was the impact of the speech itself upon the victims, because the language of the statute and the legislative history make it explicit that "the overriding purpose of the bill, was to *compensate* the victims of crimes that are publicized in the media." Respondents' Brief in the Second Circuit at 10 (emphasis added). *Accord Children of Bedford*, 1991 WL 70950 at 14-15.

D. Exec. Law § 632-a's Minimal Impact On Freedom Of Speech And The Press Is Outweighed By The Substantial State Interest It Promotes

As the district court held, Exec. Law § 632-a imposes only an *incidental* burden on speech and, therefore, the four part test set forth in *United States v. O'Brien*, 391 U.S. at 377, should be used to determine whether the statute violates the First Amendment. As will be shown, under the *O'Brien* test Exec. Law § 632-a should be upheld.

As set forth above, the statute imposes only an incidental limitation on speech, within the meaning of *O'Brien*, because it only directly regulates conduct, i.e., the financial transaction between the criminal and some entity. The conduct that the statute regulates has an incidental effect on speech because the contract involves paying money to a criminal for speaking about his crime, but it is not inextricably intertwined with speech or a direct burden on speech because, as we have shown, attaching the criminal's profits is not a barrier to the criminal's speech as the law does not prevent a willing criminal from speaking. Moreover, as noted above at pp. 3-4, the law applies to money paid a criminal under a contract even where the work is not produced.

Since *O'Brien* applies where " 'speech' and 'nonspeech' elements are combined in the same *course of conduct*," 391

U.S. at 376 (emphasis added), it should apply here. Under the *O'Brien* test, an incidental infringement on First Amendment interests can be sustained:

> if [the statute] is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

Applying the four *O'Brien* factors to Exec. Law § 632-a, it is apparent that petitioner's First Amendment rights have not been infringed. First, it is undisputed that New York has the constitutional authority to enact a law which enables victims (or their heirs) to obtain compensation from the assets of criminals by attaching their profits and then satisfying a civil court judgment out of the money being held in escrow. "[A]side from its impact on speech," [*Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 298-299 (1984)], petitioner has conceded that there would be no constitutional infirmity if section 632-a operated in the same way as do New York's general attachment and enforcement of judgment laws. Pet. Br. at 29 ("legislatures have broad powers to enhance existing generally applicable victim compensation remedies. . . .") (footnote omitted).

Second, Exec. Law § 632-a furthers a substantial governmental interest. New York has a substantial and compelling interest in making certain that criminals do not profit from discussing or reenacting their crimes before their victims have an opportunity to be compensated from those profits. This interest is derived from a common law principle "with roots deeply fastened in universal sentiments of justice," [B. Cardozo, *The Nature of The Judicial Process* at 41], that no person should profit from his own wrongdoing. *See also* 916 F.2d at 782 (13a); *Cf. Caplin & Drysdale*, 491 U.S. at 630 (governmental interest in depriving criminals of economic powers derived from their criminal activity); *Landau v. Vallen*, 895

F.2d 888, 891 (2d Cir. 1990) ("All things being equal, we believe courts in the civil context should be particularly sensitive to the rights of the victims of crimes when they seek compensation from those accused of inflicting their injuries.")

It offends society's sensibilities and sense of fairness when a criminal seeks to profit by capitalizing on his criminal activity while his victims are unable to recover financially for their injuries. As the N.Y. Court of Appeals eloquently stated in its opinion in the *Children of Bedford* case:

> Our laws are formulated to express not only the community's standards of right and wrong, but also its views on the nature and the gravity of the wrong. To the extent that the law manifests those standards, respect for it is maintained. To that end, our statutes impose on those convicted of crime punishment and disabilities which reflect the nature and extent of the community's denunciation of particular conduct. . . . Section 632-a embodies the community's belief that it is not only wrong for criminals to commit crimes and profit from them but also wrong for criminals to salt their victims' wounds by profiting from the victimization without recompense to the victims. Thus, the statute is a codification of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs . . . and an expression of the penological concept which provides that victims expect and are entitled to 'retributive satisfaction' from our criminal justice system . . . .

Children of Bedford, 1991 WL 70950 at 15 (footnote and citations omitted).

Exec. Law § 632-a applies this equitable principle to current societal conditions to provide victims of crimes being reenacted or discussed in the media with a *meaningful* opportunity to recover for their injury and suffering *before* the criminal profits from storytelling about the crime. Section 632-a therefore furthers New York's compelling interest because it "preserve[s] the victim's equitable right to assets earned by a criminal as a result of the victimization . . . .

[T]he victims who have been injured by the criminal act, and the State, which has been called upon to render aid to those victims, should have the first claim to that money." *Children of Bedford*, 1991 WL 70950 at 14.

Exec. Law § 632-a also satisfies the third *O'Brien* factor because the statute is content-neutral and the interests furthered by the statute are *unrelated* to the suppression of free expression. The Second Circuit correctly determined that "[t]he purpose of the statute . . . is not to suppress speech but to assure that funds are set aside out of profit . . . ." 916 F.2d at 783 (15a). *Accord Children of Bedford*, 1991 WL 70950 at 25 n.2 ("The statute's purpose is to compensate crime victims not to protect their sensibilities or those of the public, by restricting offensive speech." [citation omitted]) Indeed, as discussed at p. 7, the statute contains several incentives to encourage the criminal to speak. Petitioner's argument that the statute is related to the suppression of free speech "because the very purpose of the statute was to reflect the public's 'abhorrence' at particular exercises of First Amendment rights" (Pet. Br. at 27), is not supported by the language of the statute or its legislative history.[39]

Fourth, the substantial governmental interest supporting Exec. Law § 632-a "would be achieved less effectively absent the [statute]." *United States v. Albertini*, 472 U.S. 675, 689 (1985). The standard to be applied here is not a least-restrictive analysis test. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. at 800.

By attaching only the criminal's profits from storytelling about his crime, the statute serves the state's interests in a

39 Petitioner attempts to look at the motives behind the Legislature's actions but, as *O'Brien* cautions, the Legislature's motive is irrelevant. 391 U.S. at 383. *See also City of Renton*, 475 U.S. at 47-48. In any event, it is clear that the Legislature's motive was to prevent the criminal from profiting from his crime before his victims were compensated, not to deter his speech.

manner that is not substantially broader than necessary. The criminal's insights into his own crimes have become, in today's mass media society, a valuable asset for which large sums of money are often paid. *See supra* note 10. By limiting the reach of the statute to the criminal's *profits* from discussion or reenactment about his own crime, and then only *attaching* the profits for the benefit of the particular victims of that crime to allow the victims to come forward and obtain a civil judgment against those assets, the statute achieves New York's important interest in a manner that is most effective and does not unduly burden free speech. The priorities for paying money out of the escrow account (Exec. Law §§ 632-a[8], a[11]), are also essential to achieving the state's objective since the victim is given priority over the criminal (except for a portion of his legal fees) and other judgment creditors who are not entitled to the benefit of the special statute of limitations provision. *Compare* Pet. Br. at 6.

Petitioner argues that the statute is not necessary to serve New York's compelling interest because there are a range of victim compensation remedies already available under New York law, and if those remedies are inadequate, the solution is to expand existing remedies, not adopt a specialized attachment statute directed only at profits from speech. Pet. Br. at 32-33.[40] There is no doubt, however, that existing remedies

40 In support of its argument that Exec. Law § 632-a is unnecessary and has been applied arbitrarily, petitioner refers to dicta contained in the Board's determination in the case involving the subway gunman, Bernhard Goetz. *In Re Bernhard Goetz* (New York State Crime Victims Bd.) (March 17, 1988), *slip op.* at 8. Pet. Br. at 32. The Board had determined that any money received by Goetz for his story of the events arising out of the subway shooting would not be subject to the statute. The Board's comment regarding the procedures available to litigants pursuant to the CPLR was merely an acknowledgment that a determination that section 632-a does not apply does not necessarily leave a civil litigant without remedy, but only without the special remedy in this statute, and that section 632-a does not supplant any other available existing remedies in the CPLR. With respect to the merits, as the district court held, "[t]he Board's determination that section 632-a did not apply to Bernhard Goetz was consistent with his acquittal on all counts but one—criminal possession of a weapon in the third degree, a class D felony. Penal L. § 265.02(4)." 724 F. Supp. at 180 (44a).

do not protect and can not be expanded to protect the rights of many crime victims who are covered by this statute.

The provisional remedy of attachment contained in Article 62 of the CPLR (McKinney 1980) can provide a plaintiff with a means of securing a defendant's property from which to satisfy a judgment. However, the plaintiff must seek an order of attachment and, to prevail, the court, exercising its discretion, must conclude that the plaintiff is likely to succeed on the merits and that the defendant is a non-domiciliary, a resident who can not be served or someone who has attempted to assign, dispose of, or secret property with the intent to frustrate enforcement of a judgment. CPLR §§ 6201(1),(2), (3).

An expanded Article 62 would not be as effective as section 632-a in providing crime victims with a meaningful opportunity to be compensated *before* the criminal profits from storytelling about the crime. Under Exec. Law § 632-a, a criminal's profits under a contract for the crime story can be secured before a victim even learns of the contract.[41] The entity contracting with the criminal is on notice, by the terms of the contract and then by the resulting work, that it is paying money to a criminal for his crime story and the entity is, therefore, best situated to pay that money over to the Board for the benefit of the victims of that crime. The general attachment remedy neither affords a plaintiff notice of the existence and location of attachable property, nor ensures that such property will be secured until the plaintiff takes steps to enforce the order of attachment.

In addition, expanding Article 62 would not address the cause of action, statute of limitations, and priority features

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41 The resulting product of a contract for the crime story may not be completed for considerable time after payment under the contract has occurred. For example, *Wiseguy* was published in 1985. JA 51, ¶ 10. Henry Hill had by this time already received, and may have dissipated, nearly $100,000 that he was owed under the contract. JA 90-91. Therefore, one of Hill's victims, Patricia Eisenberg, who learned of her husband's murder and Hill's criminal involvement after *Wiseguy* was published, JA 125, did not know of the existence of attachable property *before* the criminal had considerable time to dissipate the money.

contained in section 632-a. As the New York Court of Appeals noted:

> Even if the attachment laws were expanded to provide a remedy for crime victims, the provisions necessarily would operate much like Executive Law § 632-a if the statute was to serve the State's compelling interests by escrowing certain types of funds belonging to the criminal, extending the statute of limitations and ordering priorities.

Children of Bedford, 1991 WL 70950 at 17.

Similarly, expanding the remedies served by New York's general restitution statute or other victim compensation schemes would not be a substitute for section 632-a and achieve the specific purposes served by the statute. Restitution would not prevent criminals, such as Hill, from profiting from their crimes. Restitution under New York Penal Law § 60.27 (McKinney 1987) is a component of the criminal sentencing scheme. As such, restitution applies only to convicted criminals. *See also* 18 U.S.C.A. § 3681 (West Supp. 1991) (federal collateral profits of crimes restitution order applies only to convicted persons). If a criminal were to sell the story of his crime while awaiting trial, the money could be dissipated before a restitution order could be entered. Although restitution orders may be imposed upon a defendant who is indigent at the time of sentencing, *see e.g.*, *Fuller v. Oregon*, 417 U.S. 40, 53-54 (1974); *United States v. Brown*, 744 F.2d 905 (2d Cir. 1984), such orders will be difficult to enforce. Overburdened courts and probation departments are reluctant to become collection agencies for victims. Project, *Restitution Provisions of the VWPA*, *supra* note 8, at 572.

E. Section 632-a Is Also Necessary To Serve And Narrowly Tailored To Achieve New York's Compelling Interest In Ensuring That Criminals Do Not Profit From Their Crimes Before Their Victims Are Compensated

Even assuming that Exec. Law § 632-a imposes a direct and substantial, rather than an incidental, burden on speech,

the statute should still be upheld. A statute that substantially burdens freedom of speech or the press will be upheld if it is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest. *See, e.g., Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. at 637; *First National Bank of Boston v. Bellotti*, 435 U.S. at 786.[42] As both the Second Circuit and the N.Y. Court of Appeals have held, Exec. Law § 632-a survives such scrutiny.

New York has a compelling interest in ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries, and the statute is necessary to serve the state's compelling interest because it provides the most effective means of ensuring that crime victims are compensated whenever the criminal profits from telling the story of his crime. *See* discussion above at pp. 40-45. Also, under this statute, criminals are not even deprived of their profit "but merely restrained from disposing of it. . . ." *United States v. Monsanto*, 491 U.S. 600, 615 (1989) (discussing pre-conviction restraint of forfeitable assets). *Compare* Pet. Br. at 39.

Petitioner argues that the asserted state interest renders "strict scrutiny toothless" because it describes "the state's interest in terms that precisely mirror what the statute does . . . ." Pet. Br. at 42. Petitioner argues that New York has the same interest in ensuring that "until their victims are

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42 Petitioner states that New York must prove the necessity for its compelling interest, especially since other remedies exist to benefit victims of crime. Pet. Br. at 27-28, 32-33. However, there is no requirement that the state legislative record evince reasons to uphold its law as long as the state, as here, articulates reasonable and common sense explanations for the law that can survive scrutiny. *See, e.g., Austin v. Michigan Chamber of Commerce*, ____ U.S. ____, 110 S. Ct. 1391, 1398 (1990) ("State has *articulated* a sufficiently compelling rationale. . . ." (emphasis added); *Minneapolis Star*, 460 U.S. at 580 n.3 (absence of any evidence of legislative intent from the legislative proceedings did not preclude Court from determining whether state's justifications for law were narrowly tailored). In any event, the legislative record before the Court is sufficient to justify the interest served by New York's statute.

compensated, criminals will be denied the enjoyment of all assets, . . ." *Id.*

Petitioner's argument that a state can not define the interest in terms of what the statute does is incorrect. Section 632-a was enacted to benefit a special category of victims, the victims of those criminals who seek to profit by telling the story of their crime, and to ensure that such criminals do not profit from their crime *before* these victims are compensated out of the criminal's asset. This compelling interest stands on its own footing and supports the statute's distinctions. *Cf. Austin v. Michigan Chamber of Commerce*, 110 S. Ct. at 1397, 1398. *Compare* Pet. Br. at 31-32, 37-39.

The statute is narrowly tailored to achieve New York's compelling interest because its scope and operation are precisely targeted to its objective. As the New York Court of Appeals concluded, "[t]he reach of the law is limited to its purpose." *Children of Bedford*, 1991 WL 70950 at 20.

Petitioner argues that the statute's distinctions are not necessary or narrowly tailored to achieve a compelling state interest because the statute is both under-inclusive and over-inclusive. Pet. Br. at 27-44. Petitioner argues that the statute is under-inclusive because it applies only to a criminal's assets from speaking about his crime and not to all assets of the criminal, including assets derived from speech on topics other than the crime. Pet. Br. at 31, 41.

Section 632-a was not intended to compensate *all* crime victims, to attach *all* of the assets of *all* criminals or to prevent criminals in general from profiting from their crimes. As the New York Court of Appeals concluded: "The statute was never intended to reach profits received solely as a result of the criminal's notoriety. . . . That financial success is the result of their newly advertised expertise or prominence, not their illegal act. . . . Monies received by a criminal from inheritance or other sources do not relate to the crime in which a victim has been injured." *Children of Bedford*, 1991 WL 70950 at 18.

The state's compelling interest is to prohibit a criminal from profiting *from his crime* at the expense of his victims. As the Second Circuit recognized, 916 F.2d at 783 [15a],

apart from the proceeds obtained by committing the crime itself, there is virtually no other way in which a criminal profits *from his crime* at the expense of his victims than by being paid for reenacting or discussing the crime.

> The general expertise derived by a thief from a series of thefts is not the same as the tale of a specific theft committed against an identifiable victim. Payment for expertise, royalties from books that do not describe crime victims and other income and assets of criminals may be reached in other ways. Section 632-a deals with readily identifiable, locatable funds that are most commonly available to those who victimize others.

916 F.2d at 784 (17a). Therefore, the statute is not under-inclusive because few victims benefit from this statute and because criminals can still profit from their crimes if they write about other subjects or any money remains in the escrow account.

Next, petitioner argues that the statute is under-inclusive because it applies to speech about the crime even where the criminal is paid for the time he has devoted to a project of literary value and not to exploit the crime in the media. In petitioner's view, payments of royalties to authors can never constitute profits from crime. Pet. Br. at 34-37. Alternatively, petitioner argues that the statute is over-inclusive because it applies to the entire profits from a book even where the crime is an incidental part of a story which principally involves a topic other than the crime. Pet. Br. at 40-41.

Exec. Law § 632-a does not vest the Board with discretion to examine the content of the criminal's speech to determine if the crime is a major or minor part of the story, nor is the Board able to determine whether a criminal is being paid because of his storytelling about the crime as opposed to the literary value of his story or the hours of work he has devoted to it. As the district court determined, the Board's inquiry is an objective one which evaluates whether there is a contract under which the criminal will be paid and whether the story includes reenactment or discussion of the crime. 724 F. Supp. at 177-8 (39a-40a).

Even if the criminal is paid more for his labors than for his notoriety, the criminal is still *profiting from his crime* and victims of that crime should first be entitled to be compensated for their injury and suffering. New York has a compelling interest in ensuring that criminals do not profit from their crimes before their victims are compensated *under any circumstances*. "Th[e state's] interest requires that the entire proceeds due the criminal be available to the victim, whether or not the victim's story is a small or large part of the book." 916 F.2d at 784 (17a-18a). *See also Children of Bedford*, 1991 WL 70950 at 18 ("criminals covered by th[is] statute . . . create, by illegal activity, a new product—a story—which becomes profitable in the retelling."); *cf. United States v. Monsanto*, 491 U.S. at 610 ("Congress . . . adopted a provision for the special forfeiture of collateral profits (e.g., profits from books, movies, etc.) that a convicted defendant derives *from his crimes*." [emphasis added]). The degree of tailoring of the state's interest may also take account of the fact that criminals have committed a crime and that society may impose certain restrictions on their ability to profit from that crime.

CONCLUSION

For all of the above reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Dated: New York, New York
May 29, 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Perhaps because it is extraordinarily rare for a statute to be upheld under strict scrutiny, the Board struggles for the bulk of its argument to demonstrate that New York Executive Law § 632-a is not subject to that exacting standard of review. But a statute restricting payment only for speech, and only for speech of specified content, so impairs free speech interests by deterring the creation and publication of the affected speech that it is necessarily subject to strict scrutiny.

Section 632-a cannot survive strict scrutiny. The interests said to be advanced by the statute could be served by generally applicable legislation; none of those interests requires the burdens of the statute to be borne only by the specified speech.

POINT I

SECTION 632-A IS SUBJECT TO EXACTING SCRUTINY

A. Section 632-a Directly Burdens Speech

Our opening brief demonstrated that section 632-a's restriction on payment for expression directly burdens protected speech and that the uncontradicted record in this case evidences those burdens. *Wiseguy* would not have been written or published had Simon & Schuster not undertaken to make payment to Hill. S&S Br. 7, 16-21.[1]

1. The argument that section 632-a does not "directly or substantially burden free speech or publication since . . . criminals who choose to speak and entities who wish to disseminate the criminal's message are not prohibited from doing so" (Bd. Br. 22) disregards this Court's holdings, the principles of basic economics, the underlying premises and incentives of copyright law, and the Court of Appeals' specific finding that "[w]ithout a financial incentive to relate their criminal activities, most would-be story

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1 References to Simon & Schuster's opening brief are given as "S&S Br.", and to the Board's Brief as "Bd. Br."

tellers will decline to speak or write." Petition 11a; *see* S&S Br. 17-21.

No one would doubt that a law forbidding compensating judges for their work, or requiring them to wait five years for any payment to ensure the availability of funds for any judgments rendered against them personally, would diminish the ranks of those able to serve as judges. So too a law forbidding payment of writers for certain kinds of books deters the creation and publication of the books for which writers cannot be paid. The Second Circuit unanimously agreed that section 632-a has this damaging effect (Petition 6a, 11-12a, 26a), and nothing the Board points to undermines that holding.

The Board's labored demonstration that despite its restriction on payment section 632-a does not flatly "prohibit the media from communicating the criminal's message" (Bd. Br. 27-34), and its search for various reasons why some subject to the law might speak despite its burdens, are constitutionally irrelevant. Exacting scrutiny in *Meyer v. Grant* was not premised on any finding that initiative proponents could find *nobody* to circulate their petitions without payment; it was enough that that law, like the section 632-a, had the "inevitable effect of reducing the total quantum of speech that could not be paid for." 486 U.S. 414, 423 (1988). The record and common sense establish that this law has the same harmful effect. S&S Br. 19-21; *see generally* Brief for Motion Picture Association of America, especially at 35-37.

2. The principle that "[f]reedom of speech presupposes a willing speaker," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976), is beside the point because it is simply not true that "[a] person who speaks only upon receipt of a financial incentive cannot be considered a voluntary or willing speaker." Bd. Br. 23-24. The advances commonly paid by publishers to authors are not paid to overcome authors' unwillingness to speak; rather, they facilitate speech by willing speakers by enabling authors to devote their productive hours to writing instead of other remunerative work. JA 20-21, 27-28, 33, 35, 41.

The dependence of speech on some kind of payment does not deprive it of protection. The *New York Times* is entitled to First Amendment protection when it publishes a paid advertisement, even though one must presume it would be unwilling to publish the advertisement without payment. *New York Times v. Sullivan*, 376 U.S. 254, 266 (1963) (newspaper does "not forfeit that protection because [speech was] published in the form of a paid advertisement").

The creation and dissemination of protected speech frequently depends as a practical matter on payments to individuals (*e.g.*, reporters, novelists, nonfiction writers, lecturers, professors, and union organizers) from the media and other organizations engaging in speech (*e.g.*, newspapers, broadcasters, textbook publishers, churches, unions, political candidates and parties). Absent such payments, the quantity of speech would be grievously diminished, as this Court has repeatedly recognized. *See* S&S Br. 18 n. 15 (citing eight cases); *cf. Cohen v. Cowles Media Co.*, 1991 U.S. LEXIS 3639, *14 (June 24, 1991) (noting newspapers' practice of paying sources for "newsworthy material to be published").

The Board, moreover, misses the point by trying to argue that Hill was not a willing speaker. Apart from the fact that he was, the petitioner here is Simon & Schuster. It was plainly a "willing speaker," having decided to publish an anti-romantic first-hand account of the sordid reality of crime, but it could not communicate its message without payment to Hill.[2] The

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2 The Board attempts to detract from Simon & Schuster's First Amendment interests by repeatedly referring to "Hill's message," rather than Simon & Schuster's or Pileggi's, and suggesting that a literary agent rather than Simon & Schuster conceived the ideas underlying Wiseguy. Bd. Br. 11. But it cannot matter who conceived the project; either way, Simon & Schuster decided that the message of *Wiseguy* was a message it wanted to convey. It is settled that "the constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963); *New York Times Co. v. Sullivan*, 376 U.S. at 266; *Lovell v.*

(continued...)

"willingness" of *The New York Times* or *The Washington Post* to speak would not count for much under a law barring them from paying reporters, columnists, or editorial writers. Laws specifically prohibiting the myriad payments on which the system of freedom of expression depends are by their very nature and effect direct burdens on speech drawing strict scrutiny.

3. The issue here is whether the government can prohibit performance of contracts between the press and writers and primary sources, not whether public subsidies can be denied to certain writers or works to implement the goals of statutory programs. Cases holding that the government need not subsidize the exercise of constitutional rights (Bd. Br. 25-27), such as *Lyng v. Int'l Union*, 485 U.S. 360, 369 (1988), and *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), are therefore irrelevant. There is a fundamental distinction "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Rust v. Sullivan*, 59 U.S.L.W. 4451, 4457-58 (U.S. May 23, 1991) (citation omitted).

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989), is even further afield. *See* Bd. Br. 26. *Caplin & Drysdale* did not hold that the government could prevent criminal defendants from spending their own funds on attorneys of their own choosing. The money at issue there was derived from drug-law violations, and was subject to forfeiture under a general'y applicable statute. This Court simply held that the defendant had no right to spend the government's money on counsel of his own choosing. 491 U.S. 617, 626-28. Here, by contrast, New York has prohibited Simon & Schuster from spending its own untainted money to secure Henry Hill's labors.

2(...continued)
Griffin, 303 U.S. 444, 452 (1938); *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991) (cable operator).

B. Section 632-a Differentially Regulates Speech

1. The Board advances no reason for narrowly limiting to taxation the rule of *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). *Compare* Bd. Br. 35-36 *with* S&S Br. 21-22. That the rule goes further, and subjects to strict scrutiny all laws that target expression or the press, whether by taxation or other regulation, is demonstrated by *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704, 706-07 (1986), where this Court read *Minneapolis Star* to rule that "a statute that has the inevitable effect of singling out those engaged in expressive activity" is subject to demanding justification. *See also Cohen v. Cowles Media Company*, 1991 U.S. LEXIS 3639, *14 (June 24, 1991) (strict scrutiny not required because Minnesota doctrine of promissory estoppel did "not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota"); and *Barnes v. Glen Theatre, Inc.*, 1991 U.S. LEXIS 3633, *11 (June 21, 1991) (applying *United States v. O'Brien*, 391 U.S. 367 (1968), because state "has not banned nude dancing as such, but has proscribed public nudity across the board").

2. The Board alternatively contends that statutes that target the press or expressive activity are, under *Leathers v. Medlock*, 111 S. Ct. 1438, 1447 (1991), strictly scrutinized only if they are "directed at, or presen[t] the danger of suppressing, particular ideas." Bd. Br. 38. *Leathers* applied that analysis to a tax generally applicable to virtually all economic activity, including cable television, but which exempted newspapers and magazines. This Court found that this arrangement could not conceivably favor or disfavor viewpoint, subject matter or ideas, and noted that the generality of the regulation firmly protected against this danger. But *Leathers* did not address a statute distinguishing expression from all other activities; it did not overrule *Minneapolis Star*'s holding that laws differentially regulating expressive activity are subject to strict scrutiny. Statutes targeting expression or the press as a whole are subject to strict scrutiny not only *if* they are targeted at or present the danger of suppressing particular ideas, but *because* such targeting by its very nature presents that danger,

which generality of regulation minimizes. *See* S&S Br. 22, 29 & n. 23.

In any event, this record amply discloses New York's hostility to the particular speech and speakers affected by section 632-a; New York finds such speech to cause "suffering" and "a second harm to the victim" and to be exploitative. *See* S&S Br. 24.

The very structure of section 632-a, moreover, targeting payments to the unpopular class of "criminals" as the sole subject matter of the statute, clearly presents "the danger of suppressing particular ideas" or viewpoints. Speech by criminals is likely to differ from speech by others on such matters as the utility of punishment, the economic causes of crime, and the possibilities of rehabilitation. Strict scrutiny is needed here because the legislature could have, but did not, legislate with generality to minimize the dangers of viewpoint discrimination.

C. Section 632-a Is Content-Based

1. The Board first contends that section 632-a is not content based because it "does not require the Board to 'evaluate the nature of the message.'" Bd. Br. 37. But since "the State itself defined the content of publications that would trigger liability," *Cohen v. Cowles Media Co.*, 1991 U.S. LEXIS 3639 at *15, and payments may pass from publishers to writers and sources only if the speech does not contain "thoughts, feelings, opinions, or emotions" or a "reenactment" of specified events, the restriction is content- and subject-matter based under the plain meaning of that phrase and this Court's cases. *See* S&S Br. 23 & n. 19.

2. The United States concedes that the federal statute, 18 U.S.C. § 3681, "may be characterized as content-based," and that its "reason for singling out this speech is . . . a concern that dissemination of the speech is particularly likely to aggravate the harms suffered by the victims of the crimes committed by the speaker." Brief of the United States ("U.S. Br.") at 10-11 n.15. Section 632-a is equally content-based and equally hostile to the speech at which it is aimed.

3. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986), does not excuse section 632-a from strict scrutiny. First, the *Renton* reasoning has excused a seemingly content-based statute only on its own facts, in a case involving sexually oriented materials, and has no application where strict scrutiny is required because a challenged statute has placed undue burdens on speech or has targeted the press or expressive activity. *Compare* S&S Br. 24-25 *with* Bd. Br. 37-38.[3]

Second, section 632-a and its distinctions are justified not because of concern with anything like neighborhood blight, as was the zoning ordinance at issue in *Renton*, but rather with the public's abhorrence at payments being made for expression of certain content. *See* S&S Br. 24. It is therefore subject to the same scrutiny that would apply to laws barring payment of priests for religious speech (or barring newspapers from paying columnists writing about abortion more than the minimum wage, or barring payment of artists for abstract art), even if the legislature were motivated by public offense and abhorrence at seeing priests (or

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3 The Court in *Renton* manifested no intent to overrule either such content-based strict scrutiny decisions as *Carey v. Brown*, 447 U.S. 455 (1980), and *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984), or such burden-on-expression strict scrutiny cases as *Meyer v. Grant*, 486 U.S. 414 (1988), and *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781 (1987), or such press-targeted strict scrutiny cases as *Minneapolis Star*. In these cases and many others, statutes were invalidated without any finding that they were aimed at the content of speech, and despite plausible attempts to justify them by considerations other than the expected communicative impact of speech. If strict scrutiny were limited to cases where the proponents of regulation admit their concern over the communicative impact of speech, precious little would be left of the doctrine.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (Bd. Br. 36, 38) is inapposite, since it addressed a time, place and manner regulation that impacted only on the volume of sound, and did not on its face select activity for regulation on the basis of content or subject matter.

columnists or artists) profit for speech of that content, rather than by offense at content or any purpose to suppress it.

D. *United States v. O'Brien* Is Inapplicable

The argument that *United States v. O'Brien*, 391 U.S. 367 (1968), supplies the correct standard of review here ignores our demonstration that *O'Brien* applies only to general regulations of conduct that are incidentally, and only sometimes, applied to expressive conduct. *O'Brien* cannot apply to a statute that regulates speech "on its face," or to one that regulates speech in all of its applications. *Compare* S&S Br. 26 *with* Bd. Br. 39-40 (failing to cite a single case in which *O'Brien* was applied to a statute aimed at speech-related activity). *See also Cohen v. Cowles Media Co.*, 1991 U.S. LEXIS 3639, *12-14 (*O'Brien* applied because "the Minnesota doctrine of promissory estoppel is a law of general applicability"); *Barnes v. Glen Theatre, Inc.*, 1991 U.S. LEXIS 3633, *11 (not applying strict scrutiny because state banned public nudity generally, not "nude dancing as such"), and *id.* at *22, *28 (Scalia, J., concurring) ("On its face, this law is not directed at expression in particular. . . . A law is 'general' . . . if it regulates conduct without regard to whether that conduct is expressive.").

The contention that payment for speech is "not inextricably intertwined with speech . . . because . . . attaching the criminal's profits is not a barrier to the criminal's speech as the law does not prevent a willing criminal from speaking" (Bd. Br. 39) is squarely contradicted by the record in this case, which shows how this law does deter speech, and by all the cases holding restricting amounts private parties agree to pay and receive in order to create and disseminate speech *is* a direct and substantial barrier to speech. *See* S&S Br. 17-18. An enormous amount of the protected speech on which our free society depends could be effectively suppressed if strict scrutiny were not applicable to laws that delay for years payment for certain expression, but permit such payment for any other service and for expression of different content.

POINT II

SECTION 632-A'S TARGETED APPLICATION ONLY TO PAYMENTS FOR EXPRESSION, AND ONLY TO EXPRESSION OF SPECIFIED CONTENT, CANNOT SURVIVE EXACTING SCRUTINY

Both the Board and the Second Circuit have ignored how unusual, indeed virtually unprecedented, it is to uphold a statute upon exacting review. "Only rarely are statutes sustained in the face of strict scrutiny . . . strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (citation omitted).[4]

So powerful is the First Amendment's direction that "no law" shall abridge free speech that the Court has at times observed that "government has *no power* to restrict expression because of its message, its ideas, its subject matter, or its content," *Police Department of Chicago v. Mosley*, 408 U.S. at 95 (citations omitted, emphasis added), and has recently and unanimously said that strict scrutiny is a "well-nigh insurmountable" burden. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). With the exception of two decisions emphasizing the unique concern for avoiding corruption of the political process, the Court has apparently not upheld on strict scrutiny a single statute challenged as violative of free speech in three decades.[5]

Section 632-a fails strict scrutiny not only because it is not narrowly tailored to serve the State's asserted interest, as we show below, but more fundamentally because its substantial burden on speech is inconsistent with free expression. Here, as in other cases, the harm to freedom of speech far outweighs the extent, if any, by which the law furthers legitimate state interests. *See, e.g.*,

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4 The "strict scrutiny" test applied in equal protection cases such as *Bernal* is the same test applied in the First Amendment context. *Ward v. Rock Against Racism*, 491 U.S. 791, 798 n.6 (1989); *Police Dep't v. Mosley*, 408 U.S. 92, 101 & n.8 (1972).

5 *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1987); *Buckley v. Valeo*, 424 U.S. 1 (1976).

Meyer v. Grant, 486 U.S. at 425-428; *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (recovery for speech that intentionally inflicts emotional distress absent proof of "actual malice" would deny "adequate 'breathing space' to the freedoms protected by the First Amendment"); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("It has yet to be demonstrated how governmental regulation [of a right of reply] can be exercised consistent with First Amendment guarantees of a free press. . . ."); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) ("The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment").

The New York Court of Appeals has since our opening brief authoritatively identified the two interests assertedly underlying section 632-a: "preserv[ing] the victim's equitable right to assets earned by a criminal as a result of victimization" (an interest it referred to as ensuring that "criminals should not be permitted to profit from their wrongs") and "impos[ing] on those convicted of crime punishment and disabilities which reflect the nature and extent of the community's denunciation of particular conduct . . ." *Children of Bedford*, 1991 NY LEXIS 647, *17-19 (May 7, 1991). But the Board has not demonstrated that this statute is necessary and narrowly tailored to serve those two interests, or that they are even implicated on the record here.

A. The Interest in Preserving Victims' Rights to Assets Earned Through Victimization Cannot Justify Section 632-a

If existing remedies to enable victims to obtain compensation from criminals are inadequate, they can be generally expanded. New York's attachment statute can be made available in all cases of crime, or for all violent crimes; the statute of limitations can be generally extended for all crime victims; *etc.* Section 632-a enhances victims' remedies, however, as to assets that flow from speech and in no other cases, supposedly because the assets in question are themselves uniquely the result of "victimization" or are uniquely the "profits of crime."

The Board, however, has only *ipse dixit* to support its assertion that all the advances and royalties subject to section 632-a (including the royalties due Hill) are the "profits of crime." Government cannot abridge free speech simply by labeling a broad variety of payments for expression the "profits of crime." Payment for works like *The Autobiography of Malcolm X*, *Wiseguy*, and the other works noted in our opening brief (at pp. 36, 39-40) do not become crime profits through legislative fiat. The undisputed record demonstrates that Henry Hill, who jointly owns the copyright in *Wiseguy*, was paid for providing what authors and primary sources generally provide, hard creative work and long hours. As the Supreme Court held in *Mazer v. Stein*, 347 U.S. 201, 219 (1954), "Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *See* S&S Br. 7, and JA 26-27, 30, 83.[6]

The Board's denial that section 632-a underinclusively fails to reach all the other payments received by "criminals" that have as strong a connection to criminal activity as do subsequent writing, on the purported ground that those other payments arise from "newly advertised expertise or prominence," not from an "illegal act," is unavailing. Bd. Br. 47, quoting *Children of Bedford*. Payments like those made to Willie Sutton to consult on bank security, to reformed addicts who become drug rehabilitation

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6 Even outside the First Amendment context, courts have been careful to reject governmental attempts to obtain forfeiture of assets that lack a direct and substantial nexus with the underlying criminal conduct. *See, e.g., United States v. Busher*, 817 F.2d 1409, 1414-16 (9th Cir. 1987) (no forfeiture "of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations not central to the conduct of the business"); *United States v. Porcelli*, 865 F.2d 1352, 1365 (2d Cir.), *cert. den.*, 110 S. Ct. 53 (1990) (same); *United States v. McKeithen*, 822 F.2d 310, 313-15 (2d Cir. 1987) (vacating forfeiture of entire property and limiting it to 43% portion found by jury to have housed drug enterprise); *United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985) (*per curiam*); *United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026, 1029-30 (1st Cir. 1980).

counselors, to burglars-turned-locksmiths, and to criminals-turned-evangelicals, are no less (and no more) the profits or the result of crime than are the royalties due Henry Hill. Payments made to Gordon Liddy for his appearance in a liquor advertisement now running in several magazines are plainly the result of the notoriety he gained through crime; yet since he does not discuss his crime in the advertisement a statute like New York's would not reach the payment. Payments for writing books that mention prior events deemed crimes are indistinguishable in terms of the state's asserted interests from these other payments that New York has chosen not to regulate. *Compare* S&S Br. 41-43 *with* Bd. Br. 47-49 and *Children of Bedford*, 1991 NY LEXIS 647, *22-23.

Section 632-a's overinclusiveness with respect to this interest is highlighted by the federal statute discussed in the United States' brief. Whatever its other defects arising from its targeting of expression, 18 U.S.C. § 3681 is at least limited so that no restriction on payment for speech can be imposed until after a conviction, at which time it has become clear whether a crime has been committed and whether it has victims.[7] Moreover, even then speech will be deterred by a payment restriction only if the United States Attorney believes, and the court finds, that "the interest of justice or an order of restitution under this title so requires." Thus, under § 3681 publishers are free to enter into publication agreements with all persons, including convicted criminals, without the ongoing deterrent effect of a looming penalty resulting from a possible future determination by an administrative board that the payment was improper at the outset. Indeed, the requirement that a court enter an order before § 3681 applies makes possible further narrowing of the statute's reach; courts might enter orders only in the context of restitution orders reaching all of a convicted

7 Although the Board had previously ruled that victimless crimes are within section 632-a, *see* S&S Br. 5 n.7, the New York Court of Appeals disagreed and recently narrowed section 632-a to exclude victimless crimes, *Children of Bedford*, 1991 NY LEXIS 647, *18. This reduces but surely does not cure the statute's overbreadth.

criminal's after-acquired assets, or only where the prospect of payment induced the crime.

As the United States notes here, during the debates leading to § 3681, "Senator Mathias remind[ed] the Senate that 'the writings of criminal defendants have played an important role in our society and culture' . . . ." As a result, a narrowed statute was enacted, one that "would not apply to most of the literary works described in the petition, see Pet. 14." U.S. Br. at 4, nn. 5 & 6. Section 632-a, by contrast, sweeps well past the interests asserted by the State to deter these works that the federal statute does not deter.

B. Section 632-a Is Not Necessary or Narrowly Tailored To Advance the Interest in Denunciation and Punishment of Criminals

The Board has never suggested that an interest in inflicting additional "punishment," "denunciation," and "retribution" underlies section 632-a, and does not do so here, notwithstanding the Court of Appeals' mention of this interest (without the slightest support in the legislative history) in *Children of Bedford*. *See* Bd. Br. 46.[8] A law functioning simply as a special attachment provision for victims, that applies to those never tried or convicted and to those acquitted by reason of insanity, that assists state tax authorities and judgment creditors generally, that applies to federal as well as state crimes, and that provides for the return of any royalties to convicted criminals if no victims step forward and obtain judgments within five years, is plainly not designed to impose punishment or retribution, and is in any event entirely untailored to serve that interest.

But even assuming *arguendo* that punishment and retribution was a goal of the law, section 632-a is impermissibly overinclusive with respect to that interest. First, by reaching those immunized,

8 Even where intermediate rather than strict scrutiny applies, the Court has refused to consider state interests that are mere afterthoughts that did not actually underlie the enactment in question. *E.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

never tried, or acquitted by reason of mental disease or defect, the law applies far beyond persons who, having been duly convicted, are proper subjects for advancement of that interest, and indeed that interest is not even implicated on these facts. *See* Point II C *infra*. Second, the legislative power to define punishments is no less subject to the specific restraints of the Bill of Rights than are other governmental powers. Even incarcerated prisoners retain certain fundamental constitutional rights (although subject to restraint for reasons of security), *e.g.*, *Procunier v. Martinez*, 416 U.S. 396 (1974) (free speech); *O'Lone v. Shabazz*, 482 U.S. 342 (1987) (free exercise of religion); and *Turner v. Safley*, 482 U.S. 78 (1987) (right to marry); *cf. Skinner v. Oklahoma*, 316 U.S. 527 (1942) (right of procreation). It follows *a fortiori* that states may not impose on all convicted criminals life-long restrictions on the fundamental rights to pray, join a church, marry, or read and write, simply by denominating those restrictions "punishment."

At the same time, section 632-a is not necessary to serve this interest. Given the variety of ways in which states may "impose on those convicted of crime punishment and disabilities which reflect the nature and extent of the community's denunciation of particular conduct," *Children of Bedford*, 1991 N.Y. LEXIS 647, *19, New York could clearly add to its present range of punishments and disabilities, if it determines the need to do so, without effectively suppressing *Wiseguy* and all the other works that section 632-a is likely to deter. *Cf. Meyer v. Grant*, 486 U.S. at 427 (deeming other existing statutes "adequate" to serve state's interest).

The law, moreover, is underinclusive with respect to punishment. *Compare* Bd. Br. 47 *with* S&S Br. 37-43. The Board has not answered our showing that by requiring the return of escrowed royalties not obtained by crime victims in damage actions the Son of Sam law leaves "appreciable damage" to the state's asserted interest unremedied, *see The Florida Star v. BJF*, 491 U.S. 524, 541-42 (1989), making clear that the law cannot be found narrowly tailored to that interest. *Compare* S&S Br. 38 *with* Bd. Br. 17 n. 27 (return to "Capeman" murderer of royalties he had earned).

C. The Interests Asserted Are Not Implicated By The Facts Here And Therefore Cannot Defeat Simon & Schuster's First Amendment Claim

The Court of Appeals' authoritative identification of the two interests underlying section 632-a highlights the law's substantial overinclusivness and establishes that those interests cannot be relied on here, since *Wiseguy* does not implicate them. *Texas v. Johnson*, 491 U.S. 397, 404, 407, 410 (1989); *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974).

The two interests posited by the Court of Appeals, like the statute on its face and literally every reference to compelling interests in the Board's brief and those of its supporting *amici*, relate solely to persons convicted of crime: to obtain for the victim "assets earned by a *criminal as a result of the victimization*" and to "*impose on those convicted of crime punishment and disabilities* which reflect the nature and extent of the community's denunciation of particular conduct," which the Court referred to as "retributive satisfaction." *Children of Bedford*, 1991 NY LEXIS 647, *17-20 (emphasis added). *See also, e.g.*, Bd. Br. 49 ("The degree of tailoring of the state's interest may also take account of *the fact that criminals have committed a crime* and that society may impose certain restrictions on their ability to profit from that crime.")

These interests may not constitutionally be advanced, and are in any event not served, here, where the Board's decision to apply the law rested not on any conviction but instead solely on the Board's determination that the book contained Hill's "admissions" to having committed crimes. *See, e.g., In re Winship*, 397 U.S. 358, 363-64 (1970) (finding of guilt beyond a reasonable doubt required for stigmatization and condemnation "for commission of a crime"; government "cannot adjudge [individual] guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty"); *Jones v. United States*, 463 U.S. 354, 369 (1983) (interest in retribution cannot be furthered without criminal conviction); and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167-69 (1963) ("punishment cannot be imposed without a prior criminal trial and all its incidents"; whether governmental action

is "punishment" depends, in part, on "[w]hether the sanction involves an affirmative disability or restraint . . . whether its operation will promote the traditional aims of punishment — retribution and deterrence, [and] whether the behavior to which it applies is already a crime") (footnotes omitted).[9]

A governmental interest that "is simply not implicated" on the facts of a given case cannot be relied on to defeat a First Amendment claim. *Texas v. Johnson*, 491 U.S. at 404; *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974). Neither of the two interests identified by New York's highest court does or constitutionally could apply here, and the law must at a minimum be invalidated insofar as it applies to persons not shown to be duly convicted.

POINT III

SECTION 632-A IS INVALID EVEN UNDER *UNITED STATES V. O'BRIEN*

Finally, section 632-a would be invalid even if *O'Brien* supplied the correct standard of review.

Statutes regulating conduct are constitutional notwithstanding incidental burdens on speech "if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). Contrary to the Board's argument (Bd. Br. 40-45), section 632-a fails each of these criteria.

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9 *See also Ingraham v. Wright*, 430 U.S. 651, 669, 671 n. 40 (1977); *Bell v. Wolfish*, 441 U.S. 520, 535-539 & n. 20 (1979); and *Gregg v. Georgia*, 428 U.S. 153, 183-184 & n. 30 (1976). Contrary to the implication left by the Board and some of its *amici*, the decision denying an inheritance in *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), rested on Riggs' prior conviction for murdering the testator. *See also New York Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591 (1896) (conviction for murder led to forfeiture by assignee of insurance policy of payment under policy).

First, the "conduct" at issue — a publisher's expenditure for expression to be published — *cannot* constitutionally be regulated *qua* conduct. The Court so held in *Buckley*, rejecting "the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*." 424 U.S. at 16. *See* S&S Br.26.

Second, the interest underlying the Son of Sam law is related, not unrelated, to the suppression of free speech. *See* S&S Br. 24-25; *see also* p. 6 *supra*.

Third, the law is not "narrowly drawn." *Clark*, 468 U.S. at 294. Although *O'Brien* does not import any least-restrictive means test, it nonetheless requires invalidation if "a substantial portion of the burden on speech does not serve to advance its goals," or if "the means chosen are . . . substantially broader than necessary to achieve the government's interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800.

Rarely can it have been so clear that "a substantial portion of the burden on speech" is entirely unnecessary and unproductive. To the considerable extent that it deters the publication of books subject to its terms — and this record demonstrates the effective suppression of three books Nicholas Pileggi would have written absent Son of Sam law impediments, the bowdlerization of an autobiography published by G. P. Putnam's Sons, and the belief of publishers and editors that the deterrent impact is substantial, see S&S Br. 10-12 — speech is heavily burdened without advancing any state interests whatever. On the other side of the balance is virtually nothing: in ten years the law has compensated the victims of only a single criminal, only a handful of additional escrow accounts have been established, and there is no showing or reason to believe that even in these cases the law had any marginal utility — that is, that compensation would not have been achieved thorough other available remedies, as it was in the case of Jack Henry Abbott. JA 35-36.[10] Since all of the state's legitimate

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10 The federal statute too "has not . . . generated any significant sum of money" since its enactment in 1984. U.S. Br. at 9 n. 12.

interests could be furthered by generally applicable enhancements to existing remedies (assuming the legislature was unhappy with existing remedies), such as extension of the statute of limitations in all actions by victims against criminals who injured them, the burden on speech created by section 632-a is entirely gratuitous.[11]

Just as clearly the law's means are substantially broader than necessary to achieve the interests identified by the Court of Appeals. The statute reaches far beyond the first interest by reaching assets that are in no sense "earned as a result of victimization," as exemplified by its application to the entire payment to Henry Hill for *Wiseguy* which was for hundreds of hours of conversation with Pileggi, not the "profit of crime." *See* S&S Br. 7, 36, 40-41, and pp. 13-14, *supra*. The statutory means are also far broader than necessary to further the interest in "punishment and disabilities," "denunciation," and "retribution," since these are impermissibly imposed on those who have not had the protection of a judicial trial. *See* Point II C *supra*.

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11 The Board's attempt to inflate the accomplishments of the Son of Sam law is highly misleading. *See* Bd. Br. 8 n. 13 and 17 n. 27. Section 632-a did not help the victims of David Berkowitz to obtain compensation. The Board's attempt to apply the statute to Berkowitz was rejected, since section 632-a as initially drafted did not apply to contracts entered into by conservators of criminals, as was its attempt to rely on a subsequent amendment. *New York State Crime Victims Board v. Johnsen*, Index 85067/77 (Sup. Ct. Kings Co. Nov. 24, 1981).

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the judgment below should be reversed, and the case remanded for entry of a declaration that section 632-a is unconstitutional, an injunction enjoining its enforcement, and an order awarding petitioner costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC., PETITIONER

v.

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether New York's "Son-of-Sam" law impermissibly restricts speech in violation of the First Amendment by providing for sequestration, for certain limited purposes, of proceeds payable to any person with respect to expressive works about that person's crimes.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the question whether New York's "Son-of-Sam" law—a statute that provides for sequestration of proceeds payable to a person for expressive works about that person's crimes—is consistent with the First Amendment. The United States submits this brief to inform the Court of an aspect of the case not fully addressed by the parties. The Victims of Crime Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. XIV, 98 Stat. 2170, contains provisions, codified at 18 U.S.C. 3681,[1] that resemble the

[1] The full text of Section 3681 is set out as an Appendix to this brief.

New York statute at issue in this case in certain respects but that differ in other significant respects. The United States is filing this brief so that the Court can evaluate the New York statute with more knowledge of the range of forms such statutes can take.

STATEMENT

1. In 1977, New York enacted the so-called "Son of Sam" law, N.Y. Exec. Law § 632-a (McKinney 1982), which generally requires any person "accused or convicted of a crime" in New York to pay over to the Crime Victims Board any moneys that person earns from any book, movie, or other expressive work depicting the person's crimes. *Id.* § 632-a(1).[2] In 1987, New York attempted to enforce Section 632-a against petitioner, the publisher Simon & Schuster, with respect to sums Simon & Schuster had paid to Henry Hill for the book *Wiseguy*, which chronicles Hill's experiences in organized crime.[3] Simon & Schuster then filed an action in the United States District Court for the Southern District of New York, contending that Section 632-a is unconstitutional and seeking declaratory and injunctive relief.

[2] Although the operative section of the statute uses the phrase "accused or convicted," a later section of the statute defines a "convicted" person to include "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." § 632-a(10)(b).

[3] Although Hill apparently was not convicted of the crimes described in the book, the New York Crime Victims Board determined that the book contained his admission to involvement in crimes. Pet. App. 50a. This admission brought Hill within the statutory definition of a "convicted" person set forth in Section 632-a. See note 2, *supra*.

The district court rejected petitioner's challenge. It concluded that the statute imposed only an incidental burden on speech and that the State's interest in compensating crime victims justified this burden. Pet. App. 33a-42a. On appeal, the Court of Appeals for the Second Circuit affirmed. Although it concluded that the statute imposed a direct burden on protected speech and thus was subject to review under a standard of strict scrutiny, it nevertheless upheld the statute on the grounds that it was narrowly tailored to serve the government's compelling interest in preventing criminals from profiting by exploiting the commercial value of stories related to their crimes while their victims went uncompensated.[4] *Id.* at 10a-16a.

2. New York's statute is not unique. As the petition suggests, the United States, as well as a large number of States, have enacted programs based in part on the New York statute. See Pet. App. 59a-60a. The federal statute, 18 U.S.C. 3681, the text of which is set out in the Appendix to this brief, was passed, with strong bipartisan support, as part of the Victims of Crime Act of 1984 (Tit. II, Ch. XIV of Pub. L. No. 98-473, 98 Stat. 2170), after more than a decade of congressional debate regarding the need for the federal government to provide compensation and assistance to the victims of crime. See S. Rep. No. 497, 98th Cong., 2d Sess. 1-2 (1984). In response to the perceived unfairness of leaving victims uncompensated while allowing criminals to profit from reports of their misdeeds, *id.* at 6-7, Congress included

[4] Judge Newman dissented, arguing that the statute could not survive the strict scrutiny applicable to content-based speech restrictions. Pet. App. 20a-26a.

in the Act a narrowly tailored program derived from the New York statute at issue in this case.[5]

The United States' program is an integral part of the sentencing process. As such, at every stage it is subject to discretionary determinations designed to provide appropriate punishment in light of the particular circumstances of the crime, the defendant, and the victim. First, it comes into play only *after* a criminal conviction, only upon the motion of the United States Attorney, and only for specified offenses against the United States.[6] Section 3681(a). Second, even if the U.S. Attorney seeks an order under Section 3681, relief is not automatic. Rather, relief is available only in two circumstances: if "the court determines that the interest of justice * * * so requires" or if "an order of restitution under this title so requires."[7] *Ibid.*

If an order is issued, the proceeds are paid to the Attorney General to be placed in escrow in the Crime

[5] The legislative history of Section 3681 demonstrates Congress's concern for safeguarding First Amendment interests. Many of the distinguishing features of the federal statute were introduced after a speech by Senator Mathias reminding the Senate that "the writings of criminal defendants have played an important role in our society and culture" and that the bill "raises important first amendment questions and demands the most careful scrutiny." 130 Cong. Rec. 23,801 (1984).

[6] The statute applies only to the crime of delivering sensitive information to foreign governments, 18 U.S.C. 794, and to crimes that cause physical harm to individuals. Thus, it would not apply to most of the literary works described in the petition, see Pet. 14.

[7] Orders of restitution issued as part of federal criminal sentences are described in 18 U.S.C. 3663.

Victims Fund[8] in the Treasury for five years after the date of the order. Section 3681(c)(1). During this five-year period, the proceeds may be levied upon, without further proceedings, to satisfy judgments rendered by federal courts with respect to crimes for which the defendant has been convicted or to satisfy fines imposed by federal courts. Section 3681(c)(1)(A). If the court determines that it serves the interest of justice, the funds also can be levied on to pay similar judgments rendered by state courts or to pay legal fees incurred by the defendant in connection with the offense for which he was convicted (but fee payments cannot exceed 20% of the proceeds). Section 3681(c)(1)(B). Finally, at the conclusion of the five-year period, the court has discretion to direct the disposition of any remaining proceeds, and is authorized to require that all or any part of the remaining proceeds be paid into the Crime Victims Fund. Section 3681(c)(2).

SUMMARY OF ARGUMENT

The government has an important interest in limiting the ability of criminals to profit from expressive works that describe their crimes. The United States and many of the States have responded to this interest with statutes that resemble the New York Son-of-Sam law in certain respects, although many of those laws differ significantly from the New York law. The federal statute, for example, does not apply until a person has been convicted and thus may be

[8] The Crime Victims Fund is a separate account in the Treasury—also established pursuant to the Victims of Crime Act of 1984—that is designed to fund state programs providing compensation or other assistance to crime victims. See 42 U.S.C. 10601-10604.

subject to a standard of review less rigorous than that of strict scrutiny. Moreover, as part of the criminal sentencing process, the federal statute serves the government's strong interests in preventing one who has been convicted of a crime from profiting from that crime, in providing restitution to his victims, and in rehabilitating him. In light of the differences among the various statutes dealing with this matter, this Court should resolve the case before it on grounds that do not unnecessarily call into question statutes that differ from the New York statute in relevant respects.

ARGUMENT

I. STATUTES LIMITING THE PROFITS CRIMINALS RECEIVE FROM THEIR CRIMES FURTHER IMPORTANT GOVERNMENT INTERESTS

Statutes limiting the profits criminals receive from expressive works that describe their crimes substantially further government interests of the highest order. As one former Congressman put it in testimony to the Senate Judiciary Committee while the Committee was considering the legislation that led to Section 3681, "there is something basically wrong about a system of justice which allows a criminal to profit from his crime while his victims continue to suffer," *Hearing on S. 2423 Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 23 (1984) (statement of M. Butler). The spectacle of criminals profiting from books or movies recounting their unlawful actions understandably and appropriately is perceived as aggravating the harm already inflicted on the victims of those actions. Moreover, such a spectacle can only undermine public faith in the efficacy of the justice system. Because these interests are harmed most

dramatically by works focusing on the criminal's depiction of his crimes, it is not surprising that the statutes themselves typically focus on this type of speech.[9] Thus, we believe the widespread recognition of these interests by the States, and by the federal government, is entitled to respect.

II. IN LIGHT OF THE VARYING FORMS OF SUCH STATUTES, THE COURT SHOULD DECIDE THE CASE AS NARROWLY AS POSSIBLE

We note that this is the first case to come before the Court in this area and that the New York statute that is challenged here represents only one of a range of approaches. The California provision, for example, is drafted as a specialized application of a general statute that places the proceeds of certain conduct in a constructive trust for the benefit of the victim. See Cal. Civ. Code § 2225 (West 1985).[10] Florida has taken yet another approach, creating a statutory lien on the proceeds of certain accounts of felonious crimes. See Fla. Stat. Ann. § 944.512 (West 1985). Some statutes commit all or a portion of funds remaining after satisfaction of judgments against the perpetrator of a crime to general funds for victims of crimes. *E.g.*, Wash. Rev. Code Ann. § 7.68.240 (Supp. 1991) (50% returns to the criminal; 50% goes to the fund).

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[9] To use an example set forth in the petition, Pet. 5, a convict's book regarding prison conditions cannot reasonably be thought to undermine public faith in the criminal process in the same way as a book generating profits from depictions of the convict's criminal actions.

[10] For a detailed analysis of the California statute, see Comment, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353, 1357-1361 (1988).

Still other statutes apply only to actual convictions, as opposed to nonjudicial admissions of guilt. *E.g.*, Wis. Stat. Ann. § 949.165(2)(b) (West Supp. 1990). In view of the range of statutory approaches, we believe it is especially appropriate for the Court to focus on the particular features of the statute before it, and to decide no more than is necessary to the disposition of this case. See *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

III. THE FEDERAL STATUTE IS AN INTEGRAL PART OF THE SENTENCING PROCESS AND SERVES SEVERAL IMPORTANT INTERESTS IN CONNECTION WITH THAT PROCESS

A. The most important feature of the federal statute is the integral role it plays in the sentencing process. Like several other provisions of victim assistance legislation,[11] this statute provides for a new criminal penalty, in addition to the traditional penalties of fines and prison sentences. The penalty authorized by Section 3681 is straightforward: the judge is authorized to order the convicted defendant to turn over to the Attorney General all profits he secures from expressive works related to the crime

[11] For example, the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248, includes a provision authorizing sentencing judges to enter restitution orders directly in favor of victims of certain crimes. See 18 U.S.C. 3663. Also, the Victims of Crime Act of 1984, in addition to the remedy set forth in Section 3681, provides for a small special assessment—to be imposed on all persons convicted of crimes against the United States—ranging from five dollars for Class C misdemeanors to $200 for felonies. 18 U.S.C. 3013. These funds go to the Crime Victims Fund described in note 8, *supra*. See 42 U.S.C. 10601(b)(2).

for which he has been convicted.[12] As is traditional in the area of criminal sentencing, the precise amount of any forfeiture is left to the sentencing court's discretion. Here, the court may impose the penalty of forfeiture only if it determines that it is required by a restitution order imposed as part of the sentence or that "the interest of justice * * * so requires." [13]

Accordingly, unlike the speech-related restrictions analyzed in this Court's decisions under the First Amendment, the sanction in Section 3681 is part of the criminal sentence itself. It is, of course, true that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction" and that

[12] Section 3681(c)(2) provides that the funds will be distributed at the end of the five-year period as the court directs. In the absence of judicial interpretation—and there does not appear to have been any to date—it is difficult to predict how sentencing courts ultimately will dispose of these proceeds. (We have been informed by the Office for Victims of Crime in the Department of Justice that the statute has been applied in only a few instances and has not yet generated any significant sum of money.) It is fair to expect, however, that in appropriate cases, remaining funds will go to the Crime Victims Fund, because Section 3681(c)(2) expressly indicates that this is an acceptable disposition.

[13] The reference to the "interest of justice" should enable the court to ensure that the sentence is appropriate in light of the nature of the work. For example, if discussion of the crime constitutes only a small part of the work, it may be expected (in the absence of any unpaid restitution orders) that the trial judge may decide not to enter an order under Section 3681, or to enter an order affecting only a portion of the proceeds. Once again, prediction is hindered by the absence of any cases interpreting or applying these provisions. But it is clear that the statute leaves it to the sound discretion of the sentencing court to ensure that the statute is not applied in ways that do not further its purposes.

they "clearly retain protections afforded by the First Amendment," *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987) (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979)). On the other hand, it also is the case that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system," *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). Indeed, the Court has allowed States to remove voting rights from convicted felons. *Richardson* v. *Ramirez*, 418 U.S. 24 (1974). Criminal convictions, in other words, have been held in appropriate circumstances to warrant deprivations that otherwise would not be acceptable. See *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976).[14]

Thus, it is far from clear that a standard of strict scrutiny should be applied in determining the validity of a provision like Section 3681.[15] Rather, a less

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[14] Similarly, the Court has made it clear in analogous civil contexts that the First Amendment does not prevent federal courts from enforcing federal statutes in ways that limit speech of specified content. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697-698 (1978) (rejecting a First Amendment challenge to an order entered under the Sherman Act that prohibited the defendants from making statements that otherwise were legal; explaining that "[t]he standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct"); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969) (explaining that the First Amendment does not bar the NLRB from preventing employers from expressing their sincere beliefs regarding the adverse consequences of unionization).

[15] On this point, we note that Section 3681 evidently is not based on an intention to suppress speech. If Congress had intended to suppress the speech of convicts, it might have

stringent standard may be warranted—one that would recognize the strong government interest in imposing appropriate punishment for criminal conduct and would consider whether the punishment was "reasonably related to the government's legitimate penological interests," *Turner* v. *Safley*, 482 U.S. 78, 89 (1987).

B. Whether the standard is one of strict scrutiny or is less exacting, the integration of the federal statute into the sentencing process serves several com-

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prohibited persons convicted of federal crimes from participating in expressive works describing their crimes. Rather, it appears that Congress was seeking to further the twin aims of enhancing the prospects for compensation of the victims of crimes and of preventing convicts from profiting by exploiting the public taste for depiction of crimes. Complete suppression of speech would not be necessary to further these interests. Indeed, it would frustrate them by limiting the profits available to compensate victims.

Similarly, it is important that the primary purpose of Section 3681, although it may be characterized as content-based, is not to regulate speech "out of concern for its * * * *communicative* impact," *United States* v. *Eichman*, 110 S. Ct. 2404, 2409 (1990) (emphasis added). The principal reason for singling out this speech is not a fear that it will persuade its audience of the truth of some unorthodox and disfavored message, but rather a concern that dissemination of the speech is particularly likely to aggravate the harms suffered by the victims of the crimes committed by the speaker. See Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334, 335-338 (1991) (arguing that a principal purpose of the First Amendment is to prevent the government from limiting speech "on the ground that the speech is likely to persuade people to do something that the government considers harmful"); cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-50 (1986) (applying a lower standard of scrutiny to a regulation that focused on the secondary effects of the speech).

pelling interests. Most significantly, as part of a sentencing statute, Section 3681 constitutes a particular application of the recognized principle that the government is entitled to recover from a convicted criminal the proceeds of his crime. The convict who has committed murder has no greater right to profit from his crime than the bank robber has to profit from his. Cf. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 629-631 (1989) (recognizing the strength of the government's interest in recovering forfeitable assets).

This interest is particularly important here, where the primary purpose of the forfeiture is to enhance restitutionary justice by creating a fund to satisfy judgments rendered in favor of victims.[16] Because those convicted of crime frequently are judgment-proof, it seems entirely appropriate for Congress to

[16] Indeed, except for the payment of the criminal's fines and a narrow allowance for the defendant's attorney's fees, Section 3681(c)(1)(B), compensation of victims of the crime is the only purpose to which the assets can be put for five years. After five years have passed, during which time it may be assumed that the criminal's victims (or their representatives) will have had an opportunity to claim compensation, the trial judge has discretion to direct the final disposition of the funds.

Section 3681(c)(2) provides that, after five years, remaining funds may be paid to the Crime Victims Fund, and thus be made available to assist other crime victims. Although this disposition may go beyond the government's restitutionary interest (by taking more of the criminal's assets than is necessary to compensate the victims of *his* crimes), it plainly serves the government's salutary interest in compensating all crime victims; if the government is entitled—as it surely is—to forfeit the proceeds of crime and deposit them in the general treasury, then *a fortiori* it is entitled to forfeit the proceeds and use them to compensate and assist the victims of crime.

earmark this particular source of a criminal's funds —earned from exploitation of his crime—for payment of judgments obtained by his victims.[17]

We note also that a forfeiture order of this kind may be seen as serving not only the goals of retribution and compensation of victims, but also of rehabilitation. By requiring that the profits arising out of their crimes be expended on compensation to and assistance of the victims of crimes, the statute may help criminals to recognize the tragic costs that criminal actions impose on victims. See Lamborn, *Remedies for the Victims of Crime*, 43 S. Cal. L. Rev. 22, 27 (1970); *United States* v. *Brown*, 744 F.2d 905, 909 (2d Cir.), cert. denied, 469 U.S. 1089 (1984); cf. *Kelly* v. *Robinson*, 479 U.S. 36, 52 (1986) (noting that criminal restitution orders further the state's interest in rehabilitation).

CONCLUSION

The New York statute before this Court is only one of many programs adopted by state and federal legislatures in order to further the public interest in preventing criminals from profiting from their crimes. We urge the Court to recognize the substantial interests underlying all these statutes; at the same time, we urge that on this first occasion involving a challenge to the validity of such a statute, the

[17] Compare *Hearing on S. 2423 Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 23 (1984) (statement of M. Butler) ("In my view, this legislation does little more than extend a well-established principle of the law which allows a claimant to attach a defendant's property when the claimant's possibility of recovery is in jeopardy.").

Court's decision should be no broader than is necessary to resolve the case at bar.

Respectfully submitted.

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APRIL 1991

APPENDIX

18 U.S.C. 3681:

(a) Upon the motion of the United States attorney made at any time after conviction of a defendant for an offense under section 794 of this title or for an offense against the United States resulting in physical harm to an individual, and after notice to any interested party, the court shall, if the court determines that the interest of justice or an order of restitution under this title so requires, order such defendant to forfeit all or any part of proceeds received or to be received by that defendant, or a transferee of that defendant, from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts, opinions, or emotions regarding such crime.

(b) An order issued under subsection (a) of this section shall require that the person with whom the defendant contracts pay to the Attorney General any proceeds due the defendant under such contract.

(c)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may—

(A) be levied upon to satisfy—

(i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such

defendant has been convicted, or a legal representative of such victim; and

(ii) a fine imposed by a court of the United States; and

(B) if ordered by the court in the interest of justice, be used to—

(i) satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted, or a legal representative of such victim; and

(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.

(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.

(d) As used in this section, the term "interested party" includes the defendant and any transferee of proceeds due the defendant under the contract, the person with whom the defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

v.

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, AND ANGELO PETROMELIS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

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AMICUS BRIEF IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Amicus curiae Motion Picture Association of America, Inc. ("MPAA") is a New York not-for-profit corporation that seeks to advance the interests of the American motion picture industry. MPAA's members[1/] are primarily engaged in the production and distribution of filmed entertainment, including theatrical motion pictures, television programs, and home videos.

New York's "Son-of-Sam" law, N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1991) and similar laws in other jurisdic-

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1/ Buena Vista Pictures Distribution, Inc.; Columbia Pictures Entertainment, Inc.; MGM/Pathe Communications Company; Orion Pictures Corporation; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal City Studios, Inc.; Warner Bros. Inc.

tions place significant and unjustified burdens on the MPAA's members and others who engage in film-making. These laws make it impossible or very difficult for film-makers to obtain the rights necessary to make films based on specific crimes from the persons accused or convicted of those crimes, or to obtain the assistance of such persons in the making of such films.

The "true crime story" film genre and the film biography in which depiction or discussion of crime is critical to the development of the subject's life have been mainstays of the movie industry from the silent era of the early twentieth century to the present time. Access to "criminal sources" crucial to the making of these films generally requires financial compensation.

Film-makers face the same chilling effect from the "Son-of-Sam" law as do book publishers such as Simon & Schuster. Because screenplays of many crime/biography movies are based on books, the link between book publishers and film-makers is especially close. Thus, the MPAA's members have a strong, direct interest in the petitioner's effort to protect its First Amendment rights against the constraints imposed by the "Son-of-Sam" law.

Both petitioner and respondents have consented to the filing of this brief. Their letters of consent[2/] are filed herewith.

[2/] Letter from Charles S. Sims to Richard M. Cooper (Mar. 7, 1991); Letter from Robert Abrams to Richard M. Cooper (Mar. 19, 1991).

SUMMARY OF ARGUMENT

New York's "Son-of-Sam" law cannot be sustained unless it passes the strict scrutiny test. The law fails this test: no compelling state interest justifies the restraints imposed by the law upon the making of films and other expressive works.

Filmed accounts of "real life crimes" have constituted a substantial part of the motion picture industry from its inception. Significant silent era films featured the "criminals" themselves, who presumably were paid for their efforts. Non-gangster crime films and biographies in which political figures and issues of political corruption were depicted also drew considerable attention during the silent era. Important social protest films of both the silent

and early modern eras of film-making also depicted real-life crimes in which the real-life criminals received compensation for the information and guidance they provided to the film-maker.

Critically acclaimed films of the present time have presented the thoughts and emotions of persons who have committed crimes. Such films could not have been made without contractual arrangements with such "criminals."

To make biographical films in which the subjects have committed a crime, payment to the "criminals" has often been necessary. Indeed, theatrical and television films generally cannot tell certain stories in which biography and criminal activity intersect unless payments are made.

Films made with the compensated services of persons convicted of crimes are also part of the mechanism by which the communications media correct their own excesses.

The burdens that "Son-of-Sam" laws currently impose on film studios may deter them from undertaking certain types of projects, and may lead to bowdlerization or fictionalization.

New York's "Son-of-Sam" law and "Son-of-Sam" laws in other jurisdictions cut film-makers off from sources who may be crucial for certain types of projects. Although repugnance at payments to such sources is understandable, the First Amendment protects freedom of speech from restraints based on such repugnance. Finally, there is no compelling need for "Son-of-Sam" laws, as distinct from laws

not targeted specifically at speech, to help victims of crime to recover compensation from perpetrators of crime.

ARGUMENT

I. INTRODUCTION

The court of appeals correctly recognized that New York's "Son-of-Sam" law, N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1990), directly burdens speech and singles it out for differential treatment based on its expressive content. Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 781-82 (2d Cir. 1990). Therefore, as the court also recognized, the statute cannot be sustained unless it "serve[s] a compelling state interest and . . . is narrowly drawn to achieve that end." Id. at 782 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

The discussion that follows demonstrates that films have made important contributions to public discussion of crime and other issues. Many of the films discussed were made possible only by payments that would have been within the scope of a "Son-of-Sam" law. Such laws currently restrain the making of socially beneficial films, and the loss of such films is not outweighed by any contribution by such laws to the advancement of compelling state interests. Therefore, as applied to films (as well as other types of expressive works), these laws violate the First Amendment.

II. FILMED ACCOUNTS OF "REAL LIFE CRIMES" HAVE CONSTITUTED A SUBSTANTIAL PART OF THE MOTION PICTURE INDUSTRY FROM ITS INCEPTION.

A. Early Films Relied on Criminals to Assist in Depicting Crimes and the Criminal Justice System.

In the silent era, pioneer filmmakers frequently strove to make realistic films about crimes and criminals. Film historian Kevin Brownlow has painstakingly demonstrated the large number of silent era films that in some fashion incorporated true crime stories.[3/] Some films "featured the very people at the storm center of controversy,"[4/] who presumably were paid for their efforts.

For example, in 1912 the renowned director D.W. Griffith made The

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[3/] K. Brownlow, Behind the Mask of Innocence 141-211 (1990) [hereinafter cited as "Brownlow"].

[4/] Id. at xxi, 152.

Musketeers of Pig Alley (Biograph Co. 1912), which was intended to show "vividly the doings of the gangster type of people," and in which "real gangsters" took part.[5/] In 1915 appeared Regeneration (Fox 1915), based on the autobiography of Owen Kildare, a Bowery gang leader of the 1890s.[6/] Kildare and others had sold the rights to his life story to film producer William Fox. The film reveals Kildare's life of crime and subsequent rehabilitation, and is remarkable for its searching examination of the impact of environment on the formation of a criminal's mind.[7/] In 1916, Regeneration was

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[5/] Id. at 184.

[6/] Id. at 189-95. See also C. Clarens, Crime Movies: From Griffith to the Godfather and Beyond 21 (1980) [hereinafter cited as "Clarens"].

[7/] Brownlow at 193-94.

selected by Moving Picture World as one of the three great American films, together with Griffith's Birth of a Nation and Ince's Wrath of the Gods.[8/]

Non-gangster crime films and biographies in which political figures and issues of political corruption were depicted also drew considerable attention during the silent era. Governor William Sulzer of New York was impeached, convicted, and removed from office in 1913 as a result of a political war with Tammany Hall.[9/] Later that year he apparently was paid to play the lead in The Shame of the Empire State (Ruby Feature Film Co. 1913), a motion picture about his unsuccessful political struggle.[10/]

[8/] Id. at 189-95.

[9/] Id. at 219-23.

[10/] Id.

Had the film included any criminal conduct by Sulzer at any stage of his life, a "Son-of-Sam" law like New York's would have applied.

Another significant American social protest film of the 1920s, The Passaic Textile Strike (Internat'l Workers Aid 1926), was a depiction of real life "criminal conduct." This film contained newsreel footage and reconstructions of the actual strike events, including violence and intervention by the police; and the film itself soon became the principal source of relief funds for unemployed strikers.[11/] From Brownlow's account, it appears that a number of the strikers appeared in the reconstructed scenes, and thus a "Son-of-Sam" law like New York's would have applied. The point is that an

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[11/] Id. at 498-508.

early American film of political and social importance focused on illegal activity and provided the participants in such activity with compensation for their cooperation, without which the film either could not have been made or, at the very least, would have been made very differently.

During the early stages of the modern era of film-making, another important social protest film also depicted a real-life crime story in which the real-life criminal received compensation for the information and guidance he provided to the film-maker. Robert Elliot Burns was a World War I veteran who had been falsely convicted of a crime and sentenced to hard labor in a Georgia penal institution.[12/] After several months

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[12/] Clarens at 108-10.

on a chain gang, Burns escaped and became a successful writer in Chicago. Seven years later, he voluntarily returned to Georgia with the assurance of a full pardon. The State broke its promise; Burns served another full year on a chain gang, escaped again, and wrote an account of the criminal justice system. He was living in hiding in New Jersey in 1932, when producer Darryl F. Zanuck and Warner Bros. acquired the film rights to Burns's memoir of his ordeal, and asked him to serve as a technical advisor for the film adaptation. Burns went to Hollywood and worked on the screenplay of I Am a Fugitive From a Chain Gang (Warner Bros. 1932), which was voted Best Picture of the year by the National Board of Review.[13/] After the release of the film,

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[13/] Id.

New Jersey's governor refused to extradite Burns to Georgia. The film's portrayal of the horrors of chain-gang prison labor helped bring about the abolition of the Georgia chain-gang system in 1937.[14/]

Thus, Zanuck and Warner Bros. continued the silent era practice of filming a real-life crime story as part of a "criminal's" biography, and using the criminal's compensated services in making the film. The social contribution of I Am a Fugitive From a Chain Gang is obvious, and was perhaps one reason why the Court later declared:

[14/] Id. See also The Prison Industries Reorganization Administration, The Prison Labor Problem in Georgia i (1937) (Report to the President of the United States); G. Guerrero, Scientific Penology Comes to Georgia, 6 Southern Exposure 42 (1978).

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (footnote omitted).[15/]

[15/] The Court's observation in Joseph Burstyn and the experiences of Robert E. Burns with a flawed criminal justice system in I Am a Fugitive From a Chain Gang have a particular resonance in the recent success of documentary film-maker Errol Morris's The Thin Blue Line (Miramax 1988). This film depicts the first degree murder conviction in Texas of Randall Adams, who was sentenced to death. As a direct consequence of The Thin Blue Line, the conviction of Adams -- interviewed at length in the film -- was overturned, and his freedom was restored. On the overturning of the conviction, see Ex parte Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989). As Morris immodestly but accurately asserts, The Thin

(continued...)

The "Son-of-Sam" law and similar laws in other jurisdictions today threaten to diminish the effectiveness of motion pictures as an organ of public opinion by closing off access to sources long-established as crucial to the filmmaker's understanding of, e.g., the role of social conditions in contributing to the commission of a crime or to the unjust conviction of a criminal defendant. Payments to such sources, an established practice from the beginning of the film industry, are but further reflections of the accuracy of Justice Scalia's observation that "[c]ompensatory employment is, I would judge, the natural order of things." Riley v. National Federation of

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[15/](...continued)
Blue Line "is the first murder mystery that actually solves a murder." See Singer, Predilections, The New Yorker, Feb. 6, 1989, at 38.

the Blind, Inc., 487 U.S. 781, 804 (1988).

B. Critically Acclaimed Films Of The Present Time Have Presented The Thoughts And Emotions Of Persons Who Have Committed Crimes, And Such Films Could Not Have Been Made Without Contractual Arrangements With Such Persons.

1. The Effectiveness and Accuracy of GoodFellas as a "Crime Film" Derives in Large Part from the Compensated Services of Henry Hill.

More than a half-century after I Am a Fugitive From a Chain Gang, Warner Bros. achieved another artistic triumph by producing a film based on a criminal's memoir, and in which the criminal himself played an important consulting role. This time, however, social protest was not the theme; the award-winning GoodFellas (Warner Bros. 1990) is an exploration of the social misfits who serve, eagerly, as the foot soldiers of

organized crime.[16/] Critics have noted that GoodFellas, by virtue of a solid foundation in the true, squalid facts of criminal life, provides an important corrective to earlier, romantic views of underworld activities and actors, some of

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[16/] GoodFellas was nominated for six Academy Awards, including best picture and best adapted screenplay. See Arnold, Oscar Juggernaut?, Washington Times, Feb. 14, 1991, § E, at 1. It won one Academy Award, for best supporting actor. The Oscar Winners, N.Y. Times, Mar. 27, 1991, § C, at 20. GoodFellas won the best picture and best director awards given by the Los Angeles Film Critics Association, the New York Film Critics Association, and the National Society of Film Critics. The Oscar Plunge; And the Other Winners Were . . ., L.A. Times, Mar. 24, 1991, Calendar section, at 6. It was also nominated for the Writers Guild of America Award for Best Screenplay Based on Material from Another Medium. United Press International, Feb. 19, 1991. GoodFellas won the best film, best director, and best adapted screenplay awards given by the British Academy of Film and Television Arts. Blowen, And the Winner is . . . (in Britain), Boston Globe, Mar. 19, 1991, Living section, at 54.

which had their origins in novels or other fictional works.[17] One reviewer asked: "Has any movie better captured the famed banality of evil?"[18] Not only professional film critics have hailed the accuracy of "GoodFellas"; law enforcement officers who have spent years fighting organized crime aver that the film faithfully captures "the crazy nonsense of how (mobsters) act and treat each other."[19] In the words of one homicide detective, watching "'GoodFellas' was like watching a story about people I knew."[20]

Of course, the verisimilitude that gives GoodFellas its power and evocativeness comes from the screenplay adaptation of Wiseguy, commissioned and published by the petitioner. Wiseguy -- and therefore GoodFellas -- was made possible only by the participation of Henry Hill, who admitted the commission of certain crimes that he related to author Nicholas Pileggi. See Joint Appendix at 26-27 (Affidavit of Pileggi). Hill demanded financial compensation for his cooperation with Pileggi. Moreover, Hill retained, with Pileggi, joint rights to any film adaptation of Wiseguy. When director Martin Scorsese and Warner Bros.

17/ Will, The Godfather's Hold on America, Washington Post, Dec. 30, 1990, § C, at 7. See also O'Brien, Mob Saga on Target, Chicago Tribune, Oct. 24, 1990, Tempo Section, at 1; Kehr, GoodMovie, Chicago Tribune, Sept. 21, 1990, Friday Section, at C.

18/ Andrews, Mobsters on a Carousel of Crime, Financial Times, Oct. 25, 1990, § 1, at 19.

19/ O'Brien, Mob Saga on Target, Chicago Tribune, Oct. 24, 1990, Tempo Section, at 1.

20/ Id.

acquired the film rights,[21] Hill had a contractual right to payment. There is no doubt that GoodFellas could not have been made without Henry Hill, and that Hill would not have participated without the assurance of compensation. Hill, in effect, was a joint author of a best-selling exposé of mob life.

Indeed, Warner Bros. hired Hill as a consultant in order to ensure that GoodFellas would preserve the realism of Wiseguy. The leading actors in the film sought advice from Hill about how they should play their roles. Robert de Niro, in particular, consulted frequently with Hill so that he could convey the realities of mob life.

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[21] The price for the film rights was reported to be $550,000. See Newsweek, Aug. 24, 1987, at 48.

2. Film-makers Who Advance Public Understanding of What Motivates Criminals Often Need Access to the Thoughts and Descriptions of Persons Directly Involved in Criminal Conduct.

The Falcon and the Snowman (Orion 1985) is the true story of two young American men, Daulton Lee and Christopher Boyce, who became Soviet spies in the mid-nineteen seventies. They were arrested in January of 1977, and later convicted. The film is based on a reporter's factual account of their criminal spying activities.[22]

Director John Schlesinger attempted, however, to do much more in the film than merely provide a chronicle of their crimes. In Schlesinger's words, "It's not so much what they did as why

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[22] R. Lindsey, The Falcon and the Snowman (1979).

that interests me. Without condoning their actions, we explore what was going on in their heads -- and in the world around them -- in the early seventies."[23/] To explore motive, to go beyond the news accounts that constitute the public's quotidian diet of crime, Schlesinger needed access to the minds of Lee and Boyce, and for access payment was necessary.

Film-makers' and authors' access to the thoughts and emotions of accused or convicted criminals has led to increased public understanding of the circumstances in which certain types of crimes occur, and to changes in the public view of such crimes. The effectiveness of films on such subjects in at-

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[23/] Kael, Schoolboys, The New Yorker, Feb. 11, 1985, at 109 (emphasis in the original).

tracting public attention and stimulating public discussion is increased when they depict not abstractions but the facts of specific real-life cases.

For example, the "battered wife" syndrome has come to be recognized as a significant social phenomenon. That recognition has resulted, in substantial part, from a television film based on a book, itself based on the author's access to the psyche of a battered wife who retaliated by killing her husband. In 1977, Francine Hughes, who had been brutally abused by her husband, was charged with murdering him by setting him on fire. In the same year, she was acquitted of murder by reason of temporary insanity. See F. McNulty, The Burning Bed (1980). In 1984 appeared the television film The Burning Bed (NBC 1984), in

which the actress Farrah Fawcett portrayed Hughes. The film helped to publicize the "battered wife" syndrome, and stimulated widespread public debate, from which legislators and the courts have gained increased understanding of the circumstances of these "perpetrators." Hughes received $11,000 in connection with the book by McNulty, and an additional $8,000 in connection with the television film.[24/]

A similar development has occurred with respect to "mercy killers."

[24/] Diliberto, A Violent Death, A Haunted Life, Time, Oct. 8, 1984, at 100.

The fact that Hughes was acquitted by reason of temporary insanity would not have placed her film and book payments outside the sweep of New York's "Son-of-Sam" law. N.Y. Exec. Law § 632-a.5 provides that "a person found not guilty as a result of the defense of mental disease or defect . . . shall be deemed to be a convicted person."

Roswell Gilbert was convicted of murdering his wife, who suffered from Alzheimer's disease. Mercy or Murder? (NBC 1984), a film portraying his case,[25/] has contributed to increased public discussion of, and perhaps to some evolution in public attitudes toward, this class of crimes. The film could not have been as effective as it was without payment to Gilbert.

Films that rely on assistance from persons accused or convicted of crimes to depict realistically more common types of crime also contribute to public understanding of contemporary social realities. In the critically acclaimed Dog Day Afternoon (Warner Bros.

[25/] See St. Petersburg Times, Apr. 15, 1988, Metro & State section, at 2B; Associated Press, Tallahassee, Fla., Apr. 14, 1988 (Nexis, Omni File).

1975), winner of the Academy Award for best screenplay, director Sidney Lumet portrayed the true story of a Brooklyn bank robbery. The key source for the film was the robber, John Wojtowicz, whose earnings from Warner Bros. were paid to the New York Crime Victims Board.[26] The film is certainly not a celebration of crime or violence; rather, it examines how environmental and personal pressures converged to make Wojtowicz desperate.

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[26] Because New York's "Son-of-Sam" law was not enacted until 1977, it did not affect the making of Dog Day Afternoon (1975). However, after the law was enacted, Warner International Corporation, the producer of the film, paid to the Crime Victim's Compensation Board approximately $43,000 that otherwise would have been paid to Wojtowicz. See Barrett v. Wojtowicz, 94 Misc. 2d 379, 404 N.Y.S.2d 829 (Sup. Ct. 1978), aff'd, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979).

3. For Film Biographies Whose Subjects Have Committed a Crime, Payment to the Subject Has Often Been Necessary.

Film-makers generally need to obtain releases from real-life "criminals" in order to make biographical films.[27] The 1988 film Patty Hearst (Atlantic Entertainment Group-Zenith 1988) is based on Hearst's own account of her 1974 abduction by, and subsequent aid to the criminal activities of, the Symbionese Liberation Army.[28] Hearst's bizarre experiences raise issues that, as film critic David Sterritt has noted, still divide Americans: Did Hearst vol-

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[27] See generally Halpern, The Right of Publicity: Commercial Exploitation of the Associative Value of Personality, 39 Vand. L. Rev. 1199 (1986). And cf., e.g., Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840 (1967).

[28] Hearst, Every Secret Thing (1982).

untarily become a criminal, or was she actually a victim of brainwashing? Did she go to jail justifiably, or was she unfairly punished because she was a child of wealth and privilege?[29] For the film Patty Hearst to be made, and for these questions to be answered, film rights had to be acquired, and payment to Hearst had to be made.[30] The issues that the film examines, however, help the public achieve much more than an opinion about Hearst alone. As Sterritt concludes, the film "isn't the story of one woman; it's the biography of an age -- an age that's gone, at least for now, and may never

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[29] Sterritt, Patty Hearst Looks Back on a Bizarre Era, Christian Science Monitor, Sept, 22, 1988, at 22.

[30] On acquisition of the film rights and payment to Hearst, see Span, Patty Hearst, Choosing the Glare, Washington Post, Sept. 26, 1988, § C, at 1.

return if we remember its lessons vividly enough."[31]

GoodFellas, Patty Hearst, and similar films point to a central fact of making film biographies based on books: to make the film, the subject/author must be paid. Shares of film rights often are determined before any producer contemplates making a film of the subject. Thus, for the counsel to the N.Y. Crime Victims Board to assert that "[w]e are not aware of any story that is not being told because someone was not guaranteed a profit,"[32] is to ignore that an important medium of communication -- theatrical and television films -- cannot tell certain stories in which biography and criminal

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[31] Sterritt, supra n.29, at 22.

[32] Newsday, Jan. 20, 1991, News Section, at 8.

activity intersect unless payments are made.

C. Films Made with the Compensated Services of Persons Convicted of Crimes Are Part of the Self-Corrective Mechanism of the Communications Media.

In A Cry in the Dark (Cannon Films, released by Warner Bros. 1988), director Fred Schepisi re-examined a sensational Australian criminal case,[33] the trial of Lindy Chamberlain, accused of, convicted for, and eventually pardoned (on the eve of the film's release) in, the death of her infant daughter. Schepisi viewed his task as making a film "that would be true to the life of a real woman, while also showing how that life was distorted in the news media."[34] A

[33] Had the case occurred in New York, the "Son-of-Sam" law would have applied.

[34] Gelmis, The Power of the Media, Newsday, Nov. 6, 1988, § 2, at 4.

Cry in the Dark was, for Schepisi, "a cautionary tale for our time about the media": a woman was wrongfully convicted of murder largely because the media perceived and portrayed her as cold-blooded, as someone who did not behave in a manner befitting a grieving mother.[35] Schepisi's point was that the image became the "truth." To expose the media's lie, he had to get inside the private lives of the accused: "We spent time getting to know the Chamberlains, so the film is about the public perception and the private reality -- and how that differs."[36] The time taken by the Chamberlains[37] to cooperate in this process was

[35] Id.

[36] Id.

[37] Lindy Chamberlain's husband, Michael Chamberlain, was convicted of being an (continued...)

compensated.[38] The result is a work that, in critic John Simon's words, portrays "honest but horrible human stupidity with unsurpassable sharpness," and is "one of the most transcendent religious films since 'Monsieur Vincent' and 'God Needs Men.'"[39]

"True crime films," then, can contribute something much more than mere media exploitation of morbid public interest in human tragedy. Such films can expose, and in fact have exposed, that

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[37] (...continued)
accessory after the fact, but was given a suspended sentence in order to care for the couple's remaining children. Like his wife, he was eventually pardoned. Simon, A Cry In The Dark, National Review, Dec. 9, 1988, at 59.

[38] L.A. Times, Aug. 23, 1989, § 1, at 2.

[39] Id.

morbid interest and the role the media play in encouraging it.

III. "SON-OF-SAM" LAWS SERIOUSLY BURDEN THE PRODUCTION OF FILMS.

Finally, the burdens that "Son-of-Sam" laws currently impose on film studios may deter them from undertaking certain types of projects, and may lead to bowdlerization or fictionalization. The following discussion summarizes the experience of one major studio.

"Son-of-Sam" laws have prevented this studio from presenting some stories of crimes from the perspective of the persons who committed them. Such persons will not provide source material or information without compensation; and, by putting that compensation beyond reach for several years, "Son-of-Sam" laws destroy their willingness to cooperate. A film-maker who wants to present the expe-

rience and outlook of the person who knows better than anyone else how and why the crime was committed is left with the unsatisfactory recourse of telling a different story, using a different approach, or resorting to fiction. These laws have thereby distorted and truncated the content of films.

The costs of analyzing the application of "Son-of-Sam" laws to particular projects, and of complying with such laws, have led the studio to abandon or defer some projects. To make a filmed biography, a studio must have rights to the subject's life story. If the subject has committed a crime, the purchase of such rights may implicate a "Son-of-Sam" law. This studio has incurred large legal and investigatory fees in efforts to determine whether such a law applies;

and, if it does, how to comply. Compliance becomes exceedingly complicated and expensive when different states' "Son-of-Sam" laws may apply because the subject committed crimes in more than one jurisdiction.

Thus, even as the Court considers the present case, the "Son-of-Sam" laws are operating to reduce the flow of ideas and information to the public.

IV. NEW YORK'S "SON-OF-SAM" LAW VIOLATES THE FIRST AMENDMENT.

The foregoing discussion demonstrates that films whose production involves payments subject to "Son-of-Sam" laws can increase and make more vivid public discussion and understanding of important matters and issues of public interest. Moreover, where excesses occur in the press's treatment of crimes and

criminals, films, like other media of communication, can play a significant role in the self-correction of the media. Films thus contribute to the robust public debate contemplated in, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

The foregoing discussion also shows that "Son-of-Sam" laws diminish the capacity of films (and other works) to make that contribution because such laws cut film-makers off from sources who may be crucial for certain types of projects. They also impose heavy burdens on film-makers, and such burdens may lead to abandonment, bowdlerization, or distortion of proposed films. Such effects are a significant loss to free expression.

Repugnance at payments to criminals for discussing their crimes is an

understandable visceral human reaction. The First Amendment, however, protects freedom of speech from restraints based on such reactions. See, e.g., United States v. Eichman, _____ U.S. _____, 110 S. Ct. 2404, 2409-10 (1990); Texas v. Johnson, 491 U.S. 397, 414 (1989); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975); Cohen v. California, 403 U.S. 15, 25-26 (1971); De Jonge v. Oregon, 299 U.S. 353 (1937); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327-28 (7th Cir. 1985) (anti-pornography ordinance), aff'd, 475 U.S. 1001 (1986); Collin v. Smith, 578 F.2d 1197, 1205-06 (7th Cir.) (march of American Nazis through community with large Jewish population), cert. denied, 439 U.S. 916 (1978). Public or governmental opposition to financial compensation of a

party for assisting in producing a film containing protected speech cannot justify a restraint on such compensation. Cf. Meyer v. Grant, 486 U.S. 414, 422-24 (1988).

A statutory purpose to "satisf[y] victims' sense of justice and desire for retribution," as suggested by the court of appeals, 916 F.2d at 783, also cannot justify imposition of substantial burdens on speech. The fact that non-speakers may become aware of speech and may feel harmed or offended by it and may want very much that it be suppressed and that the speaker suffer harm is not a basis for suppressing speech. See, e.g., Cohen v. California, 403 U.S. at 25-26; Terminiello v. Chicago, 337 U.S. 1, 4 (1949); American Booksellers Ass'n v. Hudnut, 771 F.2d at 327-28; Collin v.

Smith, 578 F.2d at 1205-06. To the extent this formulation asserts a state interest in greater punishment of criminals, it can be satisfied by means that, in contrast to the "Son-of-Sam" law, do not (i) apply prior to conviction or in the absence of any conviction, (ii) apply even after a term of imprisonment has been served and the criminal's liberty has been restored, and (iii) burden exclusively payments by the communications media for otherwise constitutionally protected speech. There is no compelling interest in satisfying victims' sense of justice and desire for retribution by means of the peculiar mechanism of "Son-of-Sam" laws.

The court of appeals asserts that "Son-of-Sam" laws "increase[] the criminal's awareness of the consequences of

his crime." 916 F.2d at 783. The court cites no evidence in support of that assertion. The magnitude of any such effect is surely small. Moreover, in view of the broad array of punishments available to state legislatures and the many means available to remind criminals of the consequences of their offenses (e.g., extended probation, civil liability), there is no compelling need for "Son-of-Sam" laws to perform that function.

Finally, there is no compelling need for "Son-of-Sam" laws, as distinct from laws not targeted specifically at speech, to help victims of crime to recover compensation from perpetrators of crime. The court of appeals asserts:

> A great societal interest is served . . . in barring criminals from profiting at the expense of victims who are in need of compensation and press their demands for restitution. Our society rightly deems it

> fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime.

Id. at 782. "Son-of-Sam" laws are not needed to serve that "great societal interest." Even without such laws, a criminal who is paid for his story can be sued by his victim(s); and, if appropriate, his assets can be attached. To secure compensation from the assets of criminals, victims can rely on the remedies, including attachment, available to civil plaintiffs generally. If there are gaps in those remedies, they can be filled by legislation not targeted exclusively at funds derived from certain types of speech.[40/] Indeed, from the perspective

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[40/] If, as the court of appeals suggests, 916 F.2d at 783, New York's attachment law provides inadequate protection to (continued...)

of victim compensation, "Son-of-Sam" laws are likely to have the perverse effect of preventing criminals from obtaining substantial funds from which victims could seek compensation.[41/]

[40/](...continued)
a crime victim suing a criminal, the attachment law can be amended to give such a plaintiff greater protection with respect to all of a criminal's assets, not merely those within the scope of the "Son-of-Sam" law. With respect to victim compensation, the line drawn between (i) assets subject to the "Son-of-Sam" law and (ii) other assets is irrational.

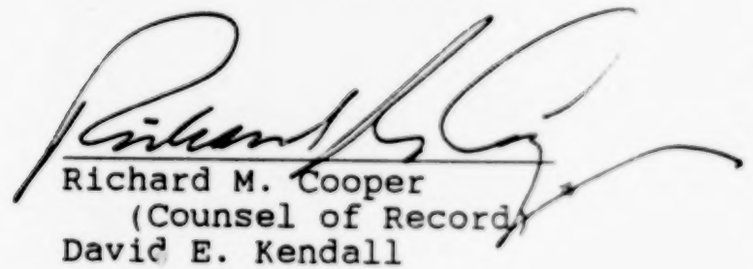
[41/] The New York Crime Victims Board has unwittingly undercut its own case by noting that compensation to crime victims in "Son-of-Sam" cases is "small-time stuff" compared to amounts distributed to crime victims not involved in "Son-of-Sam" cases. See Hevesi, Cases Under "Sam" Law: Notorious But Few, N.Y. Times, Feb. 20, 1991, § B, at 8. The apparent reason is the effectiveness of other means of redress provided by New York for crime victims, together with the probability that the principal effect of the "Son-of-Sam" law is to prevent book publishers, film-makers, and others from
(continued...)

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed, and this Court should hold that New York's "Son-of-Sam" law violates the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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[41/](...continued)
making payments to criminals that would be subject to that law. The Board's counsel has further acknowledged that the victims of the notorious Son of Sam himself, David Berkowitz, to whom the "Son-of-Sam" law did not apply, eventually received the same monies they would have received had the statute been applicable. See id.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—against—

RONALD ZWEIBEL, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELIS PETROMELIS, individually and in their capacities as members of the New York State Crime Victims Board,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONER, SIMON & SCHUSTER, INC.

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONER, SIMON & SCHUSTER, INC.

PRELIMINARY STATEMENT

The Association of American Publishers, Inc. ("AAP") submits this brief, *amicus curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of Petitioner Simon & Schuster, Inc. ("Simon & Schuster"), seeking reversal of a 2-to-1 decision of the Court of Appeals for the Second Circuit upholding against constitutional attack

Section 632-a of the New York Executive Law, New York's "Son of Sam" law.[1]

THE AMICUS

AAP, a not-for-profit trade association organized under the laws of the State of New York, is the major national association of book publishers in the United States. AAP's more than 200 members include most of the leading commercial book publishers in the United States, as well as many smaller and non-profit publishers, university presses and scholarly associations.[2] AAP's members publish works which run the gamut of published materials, including non-fiction, biography, history and fiction.

INTEREST OF THE AMICUS AND SUMMARY OF THE ARGUMENT

AAP submits this brief in order to express the views of its members concerning the adverse impact that an affirmance of the Second Circuit's decision in this case would have upon the creation and vitality of works of authorship published by AAP's members. Among the wide range of general and educational books produced by AAP members are diverse works dealing with the subject of crime. Such works comprehend fact and fiction, span disciplines such as history, sociology, psychology and criminology, and occupy the talents of often distinguished scholars, biographers, journalists, novelists and other authors. Countless additional works published by AAP members on subjects other than crime in some manner touch

1 The parties' written consents to the filing of this brief are being submitted herewith to be lodged with the Clerk of the Court.

2 While Simon & Schuster is a member of AAP, this brief is motivated by the concerns of AAP's members generally as to the adverse impact of Section 632-a of the New York Executive Law upon book publishers and upon the rights guaranteed by the First and Fourteenth Amendments.

upon that topic, as a minor but relevant portion of the works. As we discuss below, the New York statute here under review would contract the publication of such types of works—in contravention of basic First Amendment doctrine.

Simon & Schuster, one of the nation's leading book publishers, urged below that the statutory provisions here in issue, by severely curtailing its and other publishers' ability to publish works dealing with crime, violate the First and Fourteenth Amendments to the United States Constitution. The majority opinion of the Second Circuit did not dispute the inhibiting effect of the statute, but nevertheless upheld it, based upon its asserted furtherance of a compelling state interest in not rewarding criminals for their "exploitation" of their crimes so long as their victims "are in need of compensation by reason of their victimization." (13a)[3] While the majority purported to apply "strict scrutiny" to a statute that admittedly burdens speech directly and targets speech of specific content (11a-13a), as Judge Newman's dissenting opinion elucidates, the searching inquiry necessitated to uphold such suspect regulation simply was not undertaken. (19a)

It is of particular importance to AAP's members that the decision below be reversed. New York is the center of the nation's publishing industry, and home to many of AAP's members. The legislatures of other states have patterned similar "Son of Sam" laws based on New York's "model." The Second Circuit's ruling in this case, if left undisturbed, will not only adversely affect publishing activities subject to the New York statute, but likely will have the effect of legitimizing more than 30 similar statutes in other states. *See* 59a-60a. The result will be to multiply manyfold the "chilling" effect on publication exacted by the New York law.

Moreover, the Second Circuit's facile and unanalytic approach to the "strict scrutiny" standard, unquestionably called for in reviewing a statute that concededly imposes a

3 Appendix references are to the appendix to the petition for a writ of certiorari.

direct burden on free expression, threatens to erode core First Amendment protections and itself mandates reversal by this Court.

The censorial impact of New York's Son of Sam law is stark and uncontested. The broad deleterious consequences for book publishers of the ruling below sustaining that law prompts this *amicus* filing.

ARGUMENT

A. THE STATUTE IMPEDES THE CREATION OF IMPORTANT WORKS OF AUTHORSHIP.

Section 632-a of the New York Executive Law (herein the "statute" or "Son of Sam" law), which prohibits a publisher from paying monies to an accused or convicted criminal with respect to a work which "reenacts" a crime or conveys that individual's "thoughts, feelings, opinions or emotions regarding such crime" (or from paying any individual who "voluntarily admits" to a crime in his or her writings), and instead requires the publisher to submit such monies to the State to be placed in an escrow fund for five years (55a), poses a direct threat to the creation and vitality of a wide variety of works. The record unequivocally supports this conclusion and the Second Circuit did not dispute it.

Crime has always been a subject of public interest and fascination, and writings about crime are a staple of our literary heritage. It is a core function of the First Amendment to enhance the public's knowledge on matters of public moment—to promote debate and guide our leaders to proper decisions. The statute here in issue—after which similar such statutes in many other states are patterned—would contract that debate, to society's detriment, by limiting the creation of works dealing with crime.

The reach of New York's Son of Sam law is nothing short of astonishing. The withholding of monies applies equally to *accused* and convicted criminals; to the "admi[ssion]" of

crime in a writing; and to the most minor allusion to criminal activity in a work otherwise wholly devoted to other subjects.

As illustrated by the partial listing of works in the Appendix from Bruce Franklin's *Prison Literature in America*, published by Oxford University Press in 1989, attached hereto as AMICUS APPENDIX, the scope of works potentially interdicted by such statutes is breathtaking. This compendium, moreover, only includes works published by convicted criminals—not individuals accused of crimes or who have merely alluded to criminal activity in their works. While this listing likely includes works which would not have implicated Son of Sam statutes, many undoubtedly would have. This compilation bears witness to the number and types of works conceivably impacted by Son of Sam statutes such as that of New York.

Hundreds of American convicts have published accounts of their crimes or have contributed their stories to works written by other persons. These accounts, which describe and help us to understand criminal behavior in our culture, appear in an extraordinary range of works—including personal journals and diaries, poems, magazine articles, short stories, personal narratives, plays and novels. The sheer volume of works of this kind is in great part reflective of the public's curiosity—and, more than that, society's demand to *know*. Yet, many of these works would have been subject to the Son of Sam laws if such laws were in effect at the time they were published. The result would have been that many of these widely-read works would never have been published, at an incalculable loss to the reading public.

Wiseguy, published by Simon & Schuster and the immediate impetus for this constitutional challenge, illustrates a genre of works directly exploring the workings of organized crime. Other such works of historical importance include Jean Genet's *A Thief's Journal*, Henry David Thoreau's *On Civil Disobedience*, Eldridge Cleaver's *Soul on Ice* and Martin Luther King, Jr.'s *Where Do We Go From Here?* The popularity of many such works is unquestioned, as is their

contribution to the public's understanding of the criminal underworld.

Many additional works have centered on the lives of notorious criminals, exploring the roots of their criminal careers, and attempting to delve into the criminal mind. Still other works recount accused or convicted criminals' experiences with the criminal justice system, a system which, as the New York Times recently reported, incarcerates more people than any other in the world. N.Y. Times, Jan. 7, 1991 at 14, col. 1. Some of these works have been directed to the general reading public, others to academic, professional and penological audiences.

Countless works whose focus is *not* on crime nevertheless recount "admissions" of prior criminal activity. For example, numerous biographies and autobiographies depict youthful transgressions, acts of petty larceny, use of illegal drugs, and the like. Rarely are such accounts central to the works; they do, however, present a fuller picture of the biographee's background, character, and human frailties.

Works falling in each of the foregoing categories are regularly published by AAP's members. Depending, in any given instance, upon whether a particular publisher determines that the viability and/or vitality of the publishing project calls for authorship by, or collaboration with, an accused or convicted criminal within the meaning of the statute, prospective works within these categories may never be published or, if published, may be radically altered as to content. This is the direct result of the workings of the statute here under challenge. Such result serves to invalidate a principle this Court has always fought to protect—"that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley* v. *National Federation of the Blind of N.C.*, 487 U.S. 781, 801 (1988).

The statute commands that proceeds, such as a royalty advance, to an accused or convicted criminal (defined to include merely one who voluntarily "admits" to a crime in

the writing (57a)) be withheld and instead transmitted to the New York Crime Victims Board to be held in escrow for five years for the benefit of possible victims. The majority opinion below acknowledged that this statutory scheme has the effect of forestalling publishing projects since, "[w]ithout a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write." (11a).[4] The record also reveals that, even where publication plans proceed, concern over entanglement with the statute will often lead to editorial alterations unrelated to the merits of the publishing project, a form of self-censorship motivated solely by the costs, burdens, and administrative scheme of the statute. Joint Appendix at A13-A47.

The untoward effects of the statute are exacerbated by the fact that all manner of criminal activity comes within its purview—non-violent as well as violent, misdemeanors as well as felonies, federal as well as state, and, indeed, crimes as to which there may not even be any foreseeable victim. Crimes of conscience (*e.g.*, civil disobedience or draft resistance) are treated on the same plane as crimes of wanton violence; admitting to having smoked marijuana triggers the same statutory response as having been convicted for a kidnapping.

Without compelling rationale, the statute would extract from AAP's member publishers (and therefore from the reading public) an extraordinarily high—and in *amicus*' view, a constitutionally impermissible—price. With respect to a wide range of works dealing (whether preponderantly or fleetingly) with a "reenactment" of, or "thoughts, feelings,

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4 The record abounds with evidence that the statute has cast a pall over numerous publishing projects. Affidavits submitted by authors, publishers, and editors detail the numerous publishing projects which prominent publishing houses have determined not to pursue because of concerns over entanglement with the statute, and several which a prominent author, Nicholas Pileggi, has declined to pursue on that same basis. Joint Appendix at A13-A47. AAP's members could recite many additional examples of the impact of the statute on publishing projects.

opinions or emotions" concerning a crime, the State of New York—along with over 30 other states—has supplanted its judgment as to publishing suitability for that of authors, editors and publishers, and consequently has interfered with "expression that the First Amendment was meant to protect." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776.

Precisely this sort of interference with the publishing process has long been viewed as impermissible under the First Amendment. *See Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) ("[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment"). The deleterious effects of a law which intrudes upon editorial decision-making and leads to author, publisher and literary agent determinations that broad categories of works are not publishable are obvious.

The consequential impact of New York's Son of Sam law and its progeny in other states upon the First Amendment rights of AAP's members and others similarly affected warrants the application of strict scrutiny and reversal by this Court of the ruling below.

B. THE STATUTE MUST BE MEASURED AGAINST THE STRICT SCRUTINY STANDARD RATHER THAN THE SECOND CIRCUIT'S WATERED DOWN ANALYSIS; AS SUCH, THE STATUTE MUST FALL.

As recognized by the Second Circuit, speech in the form of works such as *Wiseguy* is entitled to the highest degree of First Amendment protection. (10a-13a, 19a). Commentary on crime, and its implications for the criminal justice system and the quality of life in our society, is vital and deserving of presentation to the American public from as many perspectives as possible. It is through such educative process that manifold works dealing with various aspects of crime add to our

storehouse of knowledge, thereby promoting better societal decision-making.[5] *Associated Press* v. *United States*, 326 U.S. 1, 20 (1944) ("the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, . . . a free press is a condition of a free society"). This Court has "required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content." *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981).

Moreover, it is axiomatic that a statute which "single[s] out the press for special treatment," *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983), almost certainly will not withstand First Amendment scrutiny. The court below recognized that the statute at issue does precisely that. (13a). The especial burdens placed upon book publishers and other media representatives—in attempting to comply with the vagaries of the statutory scheme, in determining whether to publish at all in the face of the law, and, if so, how to tailor a book's contents so as to keep a project viable—cannot be justified and most surely give rise to the inference "that the goal of the regulation is not unrelated to suppression of expression," a goal which is "presumptively unconstitutional." *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. at 585.

In addition, this Court has recognized the particularly crucial importance of the public's participation in society's prosecution of criminals. In *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982), the Court fiercely protected the public's access to criminal trials in the face of the admittedly compelling state concerns of protecting young victims of sex crimes and encouraging such victims to come forward and testify truthfully. In a similar vein, public access to thoughts, impressions and accounts of crimes conveyed by persons con-

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5 The broad reach of the statute to encompass works that have little to do with crime overall merely underscores why strict scrutiny is necessary—for in practice the statute interferes with all manner of serious writings, provided solely they touch on a criminal episode.

victed by our judicial system is necessary " 'to protect the free discussion of governmental affairs' " "[which underlies] the First Amendment right of access to criminal trials." 457 U.S. at 604, *quoting Mills* v. *Alabama*, 384 U.S. 214, 218 (1966).

By prohibiting payments to accused or convicted persons due under media contracts covering expression of "thoughts, feelings, opinions or emotions" regarding a crime or containing a "reenactment" of a crime, the New York statute can be applied only after the speaker has been identified and the content of the work has been reviewed. As such, the crippling shortcoming of this scheme is that it interferes with long established First Amendment rights: it is both a content-based restriction which is unconstitutional on its face, *see Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("[a]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content' " (quoting *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972)));[6] and a statute which exacts an impermissible and disproportionate burden on publishers and authors wishing to create and publish works beneficial to society, *see Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. at 585 (1983) (a statute imposing a tax only upon the press, which differed in application among members of the press based upon content-related characteristics, was held unconstitutional and found to present a threat of press censorship) and *Meyer* v. *Grant*, 486 U.S. 414 (1988) (a statute barring speakers from making payments they deemed necessary to make their speech effective was held unconstitutional as an unjustifiable burden on the right to speak).[7]

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6 *See also Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974) (a Florida statute creating a right of reply in newspapers was held unconstitutional and found to "exact[ ] a penalty on the basis of the content of a newspaper").

7 *See also First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue").

Recognizing such, the court below concluded that the statute must fall unless it withstood strict scrutiny. To this point, its reasoning was unassailable. Regrettably, in purporting to apply the strict scrutiny standard, it did little more than defer to the facial language of the statute, thus failing to place the statute under the skeptical analytical light that its speech encumbrances require. The proper analysis involves a determination as to whether the regulation is "*necessary* to serve a *compelling* state interest and that is *narrowly drawn* to achieve that end." *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37, 45 (1983) [emphasis added]. Under this analysis, the New York statute is clearly unconstitutional.

1. The State's Asserted Interests Do Not Outweigh The Damages Caused By The Loss Of Constitutionally Protected First Amendment Rights.

Where, as here, the government's conduct inevitably, even if unintentionally, deters the exercise of First Amendment rights, the interest advanced by the State must be paramount, one of vital importance and the gain to the subordinating interest provided by the means must *outweigh* the incurred loss of protected rights. *Buckley* v. *Valeo*, 424 U.S. 1, 65-66 (1976). Even assuming *arguendo* that the publication of a given work would have the effect of compensating a criminal for collaborating on the creation of a work dealing in some manner with his crime while victims remain uncompensated, the transcending inquiry is whether preventing this result is a State interest so compelling or paramount as to outweigh the resulting contraction of writings about crime and loss to society of works deserving broad readership.

The State has failed utterly to make its case for so drastic a curtailment of First Amendment expression. In holding to the contrary, the Second Circuit severely compromised the very essence of the strict scrutiny analysis. Indeed, as we next dis-

cuss, a strict scrutiny analysis was applied by the Second Circuit in name only.

2. The Statute Is Not Sufficiently Tailored To "Fit" Or "Meet" The State's Asserted Interests.

The flaw in the Second Circuit's reasoning was pointed out in Judge Newman's dissent. By defining the State's interest in terms of the statute's stated scope, the majority reached the circular conclusion that the scope of the statute was precisely tailored to the state's objective. The majority concluded that in pursuit of its goal of compensating crime victims, New York may escrow payments to criminals which flowed from books, movies, and articles written about their crimes because such practice would indeed benefit crime victims, the ultimate goal of the statute. This analysis "eliminate[d] the entire [strict scrutiny] inquiry concerning the validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech". (20a-21a). Instead, and in essence, the Second Circuit appears to have been satisfied to find a rational relationship existing between the statute's ends and means.

Even if it were assumed that the State's interest in compensating crime victims is of paramount interest, the regulation cannot be upheld because "even the most legitimate goal may not be advanced in a constitutionally impermissible manner." *Carey* v. *Brown*, 447 U.S. 455, 464-5 (1980). While it is claimed that the statute is aimed not at the suppression of expression, but at compensating crime victims, the means chosen for achieving this goal suggest otherwise.

Without regard to other sources of income or other assets that may be held by a convicted person, and which in many cases may be sufficient to compensate a crime victim, the statute reaches specifically and exclusively for speech related profits. To the extent that the statute seeks to assure the availability of assets for the benefit of crime victims, there is no justification for singling out assets derived solely from one

limited form of activity—proceeds from media contracts for works purporting to reenact the crime or reflect thoughts, opinions, feelings or emotions about a crime.

The legislature could just as easily have enacted an even-handed statute directed at securing *all* of a convicted criminal's assets, from whatever source, without undue focus upon contractual relationships involving members of the media and the resulting unique burdens placed upon the media in complying with the administrative burdens and censorial consequences of the statute. Singling out the media for special treatment under the law cannot be justified where the State's purpose could be accomplished without discrimination against the media and the resulting loss of First Amendment rights. *See Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. at 586. A legislature has not "narrowly tailored" a law to its State's goals when that law unnecessarily and unjustifiably discriminates against speech of a specific content.

Similarly, to the extent that the State's objective is to avoid the exploitation of crimes until crime victims are compensated, the statute is ill-fitted to its purpose. As Judge Newman noted, a person who acquires fame as a result of being convicted can enjoy enhanced success and profit from writing or contributing to books, films, and the like on a wide variety of topics other than the crime, without being required to relinquish under the statute the monies received. (19a).

While the Second Circuit found the "fit" between the statute and the State's objective to be sufficiently precise, the analysis used to arrive at that conclusion has been repeatedly rejected when assessing statutory schemes under the strict scrutiny standard. If the Second Circuit's mode of analysis were to pass muster, the statutes challenged in this Court's landmark cases would all similarly have been upheld. For example, the statutes imposing taxes on certain publications in *Minneapolis Star*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) would have been held valid if the State need only have shown that

the statutes achieved the State's objective of raising revenue from the publications within their coverage. Instead, this Court closely examined the distinctions made by the statutes at issue in those cases to determine whether the resulting discriminations were justified and outweighed by more important goals, and whether there was any less restrictive means of accomplishing such goals that would avoid the abridgment of First Amendment rights.[8]

In *Carey* v. *Brown*, 447 U.S. 455, 465 (1980), this Court rejected the argument that a statute was valid simply because the non-labor picketing in residential neighborhoods it prohibited could be viewed as satisfying the objective of protecting residential privacy. Applying the proper, more searching analysis, this Court found the State's interest insufficient to justify the burdens it placed on the First Amendment. "[N]othing in the content-based labor—nonlabor distinction has any bearing whatsoever on privacy. . . . Standing alone, then, the State's asserted interest in promoting privacy of the home is not sufficient to save the statute." *Id.*

Meyer v. *Grant*, 486 U.S. 414 (1988), involved a statutory scheme prohibiting the use of paid petition circulators. Following the logic inherent in the Second Circuit's analysis, the Court in that case could have found that the State's interests in protecting the integrity of the initiative process was satisfied by the statutory scheme. However, this Court properly rejected such argument as insufficient, holding that it is not enough that the scheme *satisfies* the State's goals; the strict scrutiny standard instead requires that the resulting burden

8 *See also Rutan* v. *Republican Party of Illinois*, ____ U.S. ____, 110 S. Ct. 2729, 2737 (1990) (the State's content-based conduct relating to patronage dismissals could not withstand the rigors of strict scrutiny despite the State's asserted interests in securing effective employees and employees who will loyally implement its policies and preserve the democratic process, since such interests can be satisfied with equally effective means that are less intrusive on the First Amendment).

on protected expression of any statute be shown to be *necessary* in order to meet the state's concerns. *Id.* at 426.[9]

There can be no tolerance for a watering down of the safeguards erected by this Court, designed expressly to protect the exercise of First Amendment rights. The careless (and ultimately callous) approach of the Second Circuit majority toward the protection of such rights requires correction by this Court. Any different result invites a stifling of the free and robust debate upon which this country was founded.

C. THE EXISTENCE OF OTHER, MORE EFFECTIVE MEANS OF ACHIEVING THE STATE'S ASSERTED INTEREST, WHICH DO NOT RESULT IN THE INFRINGEMENT OF FIRST AMENDMENT RIGHTS, PRECLUDES A FINDING THAT THE STATUTE IS NECESSARY FOR THE ACHIEVEMENT OF THE STATE'S GOALS.

There already exist comprehensive procedures under New York's Civil Procedure Law and Rules adequate to assure that any assets of certain accused or convicted criminals will be available to satisfy any money judgments obtained against them under certain circumstances. New York penal laws authorize sentencing judges to order restitution in every case. N.Y. Penal Law § 60.27 (McKinney 1987). That such procedures exist has been conceded by the State Crime Victims Board itself in a recent decision. *See In the Matter of the Petition of Bernhard Hugo Goetz*, State of New York Crime Victims Board, March 17, 1988. Such existing laws could, moreover, be modified if it were determined that victims were not being adequately compensated. Nothing would prohibit a victim restitution statute that would attach all of a criminal's assets and income from all sources. It is therefore difficult, if

9 *See also Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607-609 (1982) [emphasis in original] ("as compelling as that interest [(safeguarding the physical and psychological well-being of a minor)] is, it does not justify a *mandatory* closure rule" for "[t]hat interest could be served just as well by requiring the trial court to determine on a case by case basis whether" closure is necessary).

not impossible, for the State to persuade this Court that Section 632-a, which targets only income from protected speech related to criminal activity, provides a uniquely important remedy. It is simply not the case.

Indeed, unlike Son of Sam statutes, the general restitution statutes are capable of effective application without the severe deterrent effect on speech. By specifically setting out to prevent criminals from profiting from their crimes, media-targeted statutes have the direct and immediate effect of inhibiting expression which results in fewer books about crime. General restitution statutes, on the other hand, are not likely to specifically discourage such media related activity.

It is noteworthy that the statute at issue has produced just five escrow accounts in its eleven years of operation, three of which involved the same criminal. Joint Appendix at A37-A38. The compensatory effect of the statute thus far has been extremely limited, in contrast to its severe speech-inhibiting effects. In addition, the statute conceivably has harmed victims themselves as many books that would have been published but for this statute would have produced significant royalties available to victims under New York's source-and-content-neutral restitution scheme.

CONCLUSION

By allowing the State of New York effectively to curtail the creation of works dealing with crime, and otherwise to influence the manner in which such works may be written and their contents, New York's Son of Sam statute strikes at the heart of publishing autonomy guaranteed by the First and Fourteenth Amendments. Affirmance of the Second Circuit's ruling would mean that speech of substantial social value will never reach the public. This result will be brought about, moreover, without any showing of a compelling need for such curtailment, or demonstration that such a need could not have been served with a measure far less burdensome to speech.

The censorial effects of a statute such as Section 632-a are heightened when that statute applies, as it does here, to the very center of this country's publishing industry, and where the practices of many other states follow the pattern established by the New York law.

AAP respectfully urges this Court to reverse the ruling of the Second Circuit and hold that Section 632-a *et seq.* of the New York Executive Law, N.Y. Exec. L. § 632-a *et seq.*, is an unconstitutional exercise of State authority. Such a ruling, by eliminating an undue and unnecessary burden on free speech, will permit unfettered publishing activities in a now-clouded area to proceed.

Respectfully submitted,

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AMICUS APPENDIX

An Annotated Bibliography of Published Works by American Prisoners and Ex-prisoners, 1798-1988

Introduction

The bibliography included in the 1978 edition was the first attempt to catalog the works published by American prisoners and ex-prisoners in the nineteenth and twentieth centuries. It made no claim to be exhaustive, since finding and identifying literature by convicts is a formidable bibliographic task. In the ensuing four years, so many new books by American prisoners were published and so many overlooked works came to light that the publisher of the 1982 edition of *Prison Literature in America* decided to print the greatly expanded bibliography separately as an independent tool for further research. The present edition incorporates that separately bound work, together with revisions and addenda, including books published since 1981.

The bibliography does draw on some previous efforts. For the earlier literature, there was Augustus F. Kuhlman's groundbreaking *A Guide to Material on Crime and Criminal Justice* (1929), with corrections and author index by Dorothy Campbell Culver (Montclair, NJ: Patterson Smith, 1969), which includes some listings of literature by convicts and criminals, mostly personal narratives. This does not attempt to distinguish between authentic autobiographies and sensationalized narratives palmed off as "confessions" by notorious criminals. Dorothy Campbell Culver's updates of Kuhlman, *Bibliography of Crime and Criminal Justice, 1927-1931* and *1932-1937* (Montclair, N.J.: Patterson Smith, 1969), add some newer works, but literature by convicts is not indexed in her successor volumes covering the 1938 to 1965 period. *Barred Visions: A Bibliography of Materials by Prisoners*, compiled by Rhea Joyce Rubin (Chicago Public Library, 1974, with mimeographed updates in 1975), lists quite a few English-language materials published since 1950, including British writings and foreign works translated into English. The *Fortune News*, a journal published by the Fortune Society, is an excellent source for current publications.

Rudolf Engelbarts's *Books in Stir: A Bibliographic Essay . . .* (Metuchen, N.J.: Scarecrow Press, 1972) lists and discusses a few dozen works. Herman K. Spector's *San Quentiniana: Books Published by Officials and Inmates of San Quentin* (San Quentin, 1953) gives some biographical and bibliographic facts on eleven San Quentin author-inmates. The June-July 1974 issue of *Margins: A Review of Little Mags and Small Press Books* contains a thirty-page section on prison writing, edited by Joseph Bruchac, with very helpful bibliographic information not available elsewhere. *Imprisoned in America; Prison Communications: 1776 to Attica*, edited by Cynthia Owen Philip (New York: Harper & Row, 1973), is a valuable source of information about letters by American prisoners, a form I have not included unless the letters were published as a book. In 1979 appeared Daniel Suvak's far-reaching *Memoirs of American Prisons: An Annotated Bibliography* (Metuchen, N.J.: Scarecrow Press), which incorporates descriptions of prison life by officials, reporters, teachers, chaplains, etc., and includes a separate section on military prisoners (with a valuable list of narratives about World War II "relocation centers" as well as extensive records of works by prisoners of war), a category I do not cover. Suvak does not attempt to include literature by convicts that does not deal directly with their prison experience.

I have not tried to cover oral materials, such as songs, whether or not recorded and transcribed, so some of the main forms of prisoners' literary art are not represented in the bibliography. For help in this area, consult my notes to Chapters 3 and 6 of the current edition.

Another exclusion is the journals published within prisons. For an introduction to these materials, see Russell N. Baird's *The Penal Press* (Evanston, Ill.: Northwestern University Press, 1967) and Paul Dickson's "The Inmate Press," *Nation* (April 27, 1974, pp. 527-30).

After the original bibliography had gone to press, Dr. Robert Pierce, who teaches literature in the Texas Department of Corrections, very generously exchanged his current bibliographic efforts with mine. I have incorporated a few

items from his two unpublished bibliographies, "A Preliminary Check List of Criminal Justice Books in the Sam Houston University Library Published before 1900" and "A Humanities and Criminal Justice Bibliography"; these items are indicated parenthetically as "Pierce. Not examined." Some of the new entries in the current bibliography have been suggested by James Brown, Joseph Bruchac, Karen Franklin, Flora Higgins, Bill Keith, Max MacNamee, Edward Sagarin, and Jeff Youdleman. Jane Morgan Franklin has helped in more ways than I can possibly acknowledge.

An asterisk (*) preceding an entry indicates that this work is discussed in the present edition of *Prison Literature in America: The Victim as Criminal and Artist*. Most of these indicated works are also discussed in the first edition, *The Victim as Criminal and Artist: Literature from the American Prison*.

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No. 90-1059

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND PEN AMERICAN CENTER, IN SUPPORT OF PETITIONER

Leon Friedman
(*Counsel of Record*)
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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan membership organization with over 275,000 members, dedicated to defending the principles of individual liberty embodied in the Constitution. The New York Civil Liberties Union is its statewide affiliate. For over seventy years, the ACLU has been particularly associated with free speech issues and has participated in thousands of cases involving the First Amendment at every level of the state and federal courts.

PEN American Center (PEN) is an organization of 2,400 novelists, poets, essayists, translators, playwrights, and editors. As part of international PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and across national boundaries. American PEN has taken a leading role in attacking restrictive laws, rules, regulations and practices that censor, curb or limit freedom of speech or expression in the nation.

It is *amici's* position that the law at issue here is fundamentally out of step with the values and principles underlying our First Amendment traditions and jurisprudence, and for that reason *amici* support the effort of petitioner to have the law declared unconstitutional. In the instant matter, author Nicholas Pileggi presents an important picture of the criminal underworld in his book *Wiseguy*. To obtain much of the material for the book, Pileggi conducted extensive interviews with a former underworld figure, Henry Hill, who would not have provided the information without compensation. And without Henry Hill's story, the book could not have been written and published. If the Crime Victim's Board is

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

successful in its effort to hold the publisher, Simon & Schuster, liable for monies it has already paid, it is much less likely that inside stories such as *Wiseguy* will be published in the future.[2] In such a case, all society is the loser.

STATEMENT OF THE CASE

The Statutory Background

New York Executive Law §632-a is directed solely at monies earned by the exercise of the rights of free speech and free press. It applies to all contracts for a book, movie, magazine article, or play written by a person accused of a crime with respect to the "reenactment" of the crime or to the accused's thoughts, feelings, opinions, or emotions regarding a crime. A person who confesses or "voluntarily admits" to a crime is covered by the law, even if he or she is never convicted of the crime, or could not be convicted, because of the statute of limitations or for any other reason.

Only the proceeds of a book, article, movie or play are covered by the law. If the criminal obtains money

[2] The Board is also attempting to apply the law to at least two other books of great societal interest: (1) *Stranger in Two Worlds*, written by Jean Harris, and (2) *Trading Secrets*, by R. Foster Winans. The Jean Harris book is a valuable study of prison life and its effect upon women inmates. The book received excellent reviews for its careful and well-written examination of the brutalities of institutional life. Mr. Winans, who was and is a professional writer, recounted his involvement in a Wall Street trading scandal and his insights into the corporate culture and inner workings of the financial markets. His book also received many positive reviews. Yet the Crime Victims Board is attempting in both instances to obtain all royalties earned by the authors. *See Children of Bedford Inc. v. Petromelis*, 541 N.Y.S.2d 894 (Sup.Ct. N.Y.Cty. 1989), *aff'd*, 556 N.Y.2d 483 (1st Dep't 1990), *argued* (N.Y.Ct.App. March 26, 1991); and *St. Martins' Press, Inc v. Zweibel*, Index No. 89/12273 (Sup.Ct. N.Y.Co. Feb. 1, 1990).

from any other source -- inheritance, investments, exploitation of any skill acquired from criminal activity (such as learning how to break a lock or break into a computer data bank) -- the law does not attempt to reach it. The law is triggered only to reach the proceeds from a First Amendment activity.

The Legislative History

The "Son-of-Sam" law was inspired by the fear that the notorious criminal who operated under that name in the late 1970's would reap the benefits of the publicity surrounding his actions and would make a fortune from selling his story. The legislative bill jacket for the law states its justification as follows:

> Currently, a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. This bill will insure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.[3]

The first case interpreting the law noted that the law was "conceived in haste, written in haste, and declared under the cry of the public for the legislature to exact retribution . . . ." *In re Johnsen* (*Berkowitz*), 430 N.Y.2d 904, 906 (Sup.Ct. Kings Co. 1979). The law passed in the summer of 1977, as part of the New York Crime Victims Statute set forth in Article 22 of the Executive Law, just before David Berkowitz (alias "Son-of-Sam") was apprehended. It was signed by Governor Carey into law on the day after he was arrested. A later court decision noted that the Division of the Budget had

[3] *See* Bill memorandum, A 9019, set forth in Appellant's Appendix, *Children of Bedford v. Petrolmelis*, *supra*, n.2.

advised that the law was "terribly drafted," and should be vetoed, *Barrett v. Wojtowicz*, 414 N.Y.S.2d 350, 355 (2d Dep't 1979).

INTRODUCTION AND SUMMARY OF ARGUMENT

It must be emphasized at the outset that *amici* are fully in accord with the purpose behind the Crime Victims Law: victims of crime should be compensated by those who injured them, and the state should do more to help them obtain financial assistance. But what the state cannot do is to try to achieve this laudatory aim by concentrating only on one type of income, namely money obtained by writing books or movies. Not only is this approach terribly underinclusive -- how many criminals are there who are capable of writing a publishable work? -- but it violates key constitutional principles of First Amendment jurisprudence, as explained below.

The law at issue here, §632-a of New York's Executive Law, is unconstitutional under the First Amendment for several reasons. It imposes differential financial burdens on the First Amendment activity and *only* the First Amendment activity of criminal authors, and it draws distinctions based upon the *content* of the material involved and the identity of the writer. These classifications imposed by the statute can only be upheld if the statute is narrowly tailored in the pursuit of a compelling government interest. No such showing can be made here. Specifically, the statute bears only a tenuous relationship to its stated purpose of compensating crime victims. It is underinclusive because it does not reach any of the criminal's assets beyond those generated by First Amendment activity. It is overinclusive because it reaches First Amendment profits even if the book's success does not depend on the author's criminal notoriety. And, it is manifestly ineffective since it has provided compensation to only a handful of victims since the stat-

ute's enactment in 1977. Finally, writing a book cannot [illegible] be regarded as a fruit of the crime, even if the book concerns the crime, without distorting or ignoring commonly accepted legal doctrines.

ARGUMENT

I. EXECUTIVE LAW §632-A MUST BE SUBJECTED TO STRICT SCRUTINY BECAUSE IT PLACES A SEVERE AND CONTENT-BASED RESTRICTION ON THE EXERCISE OF FIRST AMENDMENT RIGHTS

A. Introduction

At the outset we must note that, while the effort to compensate crime victims is commendable, the method chosen by New York State under this law is unacceptable under the First Amendment.

We start with two obvious propositions that are not in dispute: (1) the government has broad power to punish criminals and compensate victims; and (2) the government has broad power to recover from a criminal the actual fruits, instrumentalities or proceeds from a crime.

Both of these aims reflect important, even compelling government interests. The state certainly can impose heavy financial burdens upon a convicted criminal -- in addition to imprisonment -- through fines or forfeitures. Indeed, the state has the power to punish and compensate in the same proceeding. For example, the federal government recently passed a law providing for an "order of restitution" to be entered at the same time sentence is imposed upon a convicted criminal, providing that the defendant must pay the victim of the crime compensatory damages. *See* 18 U.S.C. §3579. The order is enforceable to the same extent as a civil judgment. Thus, it can be enforced against all the assets of the defendant, from whatever source derived, for as

long as a judgment is enforceable under local law.

In addition, the state provides an elaborate system for compensating all victims of any tort -- whether or not it constitutes a crime -- through the normal civil tort suit. Upon securing a judgment, a plaintiff can reach virtually all assets of the tortfeasor. However, there are statutes of limitations that require such actions to be brought within a set period of time.

Finally, the government has broad power to recover the proceeds or fruits of a crime. Both the state and federal governments have provided comprehensive mechanisms for forfeiting such proceeds under the federal RICO statute, 18 U.S.C. §1961 *et seq.*, and under the recently enacted Article 13A of the New York Civil Practice Law and Rules (CPLR). But when a criminal writes a book, even about his crime, that book is, in no sense, the "fruit" of the crime.[4] The book is the fruit of the criminal's lawful, literary and artistic efforts. He or she may be famous because of the crime, but to consider the book the "proceeds" of the crime is to stretch the meaning of that word beyond recognition.[5]

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[4] The "proceeds of a crime" are defined in New York CPLR 1310 as "any property obtained *through the commission of a felony crime*" defined in the section (emphasis added). Under that definition, book royalties could not conceivably be covered.

[5] We explain below why the royalties from a book written by a criminal about the crime cannot be considered the "fruits" of the crime. Among other reasons cited below, one has only to look at the numerous books written by former Presidents and government officials after they leave office, which often represent the most important financial component of their retirement income. Under the federal copyright law, 17 U.S.C. §105, copyright "is not available for any work of the United States Government." If the later literary efforts of former government officials were considered the "fruits" or "proceeds" of their government work, since they became famous as a result of being President or Secretary of State, they could not obtain copyright in their work. But every court that has passed on the matter, including this (continued...)

B. By Depriving Authors Of Any Profits For A Five Year Period, The Challenged Statute Places A Severe Burden On The Exercise Of First Amendment Rights

The question presented here is not whether the imposition of financial burdens on criminals, the compensation of victims, and the forfeiture of criminal proceeds are important or even compelling state interests. The question is whether the state can select one source of income alone -- First Amendment generated income -- and create an extraordinary mechanism for compensating victims only when such income is involved.

Because the Son-of-Sam law singles out First Amendment income, the Second Circuit held that strict scrutiny applies. We agree. As the Second Circuit explained:

> We think that the District Court erred in testing section 632-a under the standards established in *United States v. O'Brien* [391 U.S. 367 (1968)] . . . despite the Supreme Court's requirement "that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule. *Texas v. Johnson*, 109 S.Ct. 2533, 2541 (1989).
>
> It cannot be said that the governmental interest advanced by section 632-a bears no relation to expression, since the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes.

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[5] (...continued)
Court, considers the later literary efforts of such officials to be a separate, individual literary act unrelated to the government service that generated the book and the public's interest in the author. *See Harper & Row, Publishers, Inc. v. The Nation*, 471 U.S. 539 (1985).

> The possibility of a payday five years or more down the road, depending on claims against the escrow fund, can hardly be seen as providing an adequate financial incentive. Without a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write.

Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 781 (2d Cir. 1990).

In applying strict scrutiny, the Second Circuit relied in part upon this Court's decision in *Meyer v. Grant*, 486 U.S. 414 (1988), which struck down a Colorado state law that prohibited paying persons to circulate petitions for ballot initiatives. The law put no restriction on the number of people who might circulate such petitions or the manner in which they might be circulated. It simply prohibited petition circulators from being paid for that activity. Nevertheless, this Court had no difficulty in finding that the law was subject to strict scrutiny.

> The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot . . . .

Id. at 422-23 (footnote omitted). In words that are equally relevant here, the Court further observed: "We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay." *Id.* at 423, *quoting Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983). *See also Riley v. National Federation of the Blind in North Carolina*, 487 U.S. 781 (1988)(North Carolina law that restricted the fees that a professional fundraiser could charge for collecting money for charity unconstitutional).

Exactly the same principle is involved in this case. Simon & Schuster has a First Amendment right to "advocate [its] cause," that is, to publish a book about a professional criminal, Henry Hill. Restricting the right to be paid for doing so inevitably inhibits a writer or publisher from deciding to write or publish a book. It also inhibits publishers from signing up similar books in the future.[6] Under the reasoning of *Meyer*, strict scrutiny must apply. Accordingly, the statute cannot be sustained unless it is narrowly tailored in the pursuit of a compelling interest.

C. The Law Imposes Differential Financial Burdens On First Amendment Generated Income

The law at issue involves discrimination against First Amendment activities and First Amendment activities only. No one doubts that the state could pass a wide variety of laws benefitting victims and allowing them to recover money from their criminal attackers. It could certainly allow victims to obtain money secured from all sources, including funds obtained by writing books. But well-established constitutional doctrine forbids the state from focusing on income derived *only* from First Amendment activities and providing for remedies dealing with that activity alone. This would be considered a discriminatory financial burden on expressive activities prohibited by the First Amendment.

The point is illustrated by recent decisions from this Court striking down laws that discriminate in the imposi-

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[6] Even if the Court did not take judicial notice of this fact, the affidavits from other publishers submitted in this matter show that such an inhibition on expressive activity is indeed occurring as a result of the Son-of-Sam law. JA13-24, 34-47.

tion of taxes against First Amendment actors. It is undisputed that the government may tax the income or property of newspapers, book publishers or movie companies. Their status as First Amendment actors does not immunize them *from financial burdens placed on all others similarly situated*. But as broad as its taxing power may be, the state cannot tax activities in which only First Amendment actors engage.

Thus, this Court wrote in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987): "Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment." No matter how small the financial burden may be, legislation "singling out the press as a whole or targeting individual members of the press . . . poses a particular danger of abuse by the State" and cannot be upheld under the First Amendment. *Id.* at 1727. *See also Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S.Ct. 890 (1989)(sales tax exemption for religious magazines violates the Establishment Clause).

Nor may the state impose a discriminatory financial burden only on activities engaged in by the press. For example, in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the Court struck down a use tax on newsprint costs over $100,000. As this Court observed in *Minneapolis Star*, "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to the suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585.

That principle was recently reaffirmed in *Leathers v. Medlock*, No. 90-29 (April 16, 1991). After reviewing its decisions in *Arkansas Writers' Project* and *Minneapolis Star*, the Court wrote:

> These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information. A tax is also suspect if it targets a small group of speakers. Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.

Leathers v. Medlock, slip op. at 6-7 (citations omitted).

Section 632-a suffers all of these defects. There is no doubt that a differential "burden" is placed upon First Amendment activities. The law "singles out the press" and engages in "differential treatment" of speech related activities: specifically, a state agency is empowered to attach certain assets for a five year period and extend the normal statute of limitations indefinitely only with respect to book and movie generated income. The law does not attempt to reach other assets of a criminal -- stocks, bonds, cash -- or to reach other income that a criminal may later make as a result of exploiting the skills he learned as a criminal (for example, the wages of a burglar who becomes a locksmith or of a bank robber who becomes an adviser to companies on security). It reaches only income that a criminal makes as an author. Again, such a differential burden is unconstitutional, unless it is narrowly tailored in the pursuit of a compelling interest.

D. The Law Is Speaker- And Content-Based

Any law that differentiates between one type of speaker and another is presumptively unconstitutional. In *First National Bank v. Bellotti*, 435 U.S. 765, 784-85 (1979), a law barring business corporations from making contributions for speech on certain subjects (which this Court interpreted as a direct restriction on speech itself) was held invalid. This Court noted: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak *and the speakers who may address a public issue*" (emphasis added). *See also FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984)(among "the purest examples of a 'law . . . abridging the freedom of speech, or of the press'. . . [is a] regulation that denies one group of persons the right to address a selected audience on 'controversial issues of public policy'. . . .").

Again, that is precisely what §632-a does. It singles out certain speakers for special disadvantages. It is only when a *criminal* writes about the crime that the prohibitions in §632-a come into operation. Any other person may write the same book and keep the proceeds. Strict scrutiny must be applied to such a differentiation.

In addition, the law is triggered only if the subject matter of the book is the "reenactment" of the crime or a description of the criminal author's thoughts, opinions, feelings or emotions about the crime. In other words, the law is invoked only if certain subjects are discussed or certain topics covered. Such a distinction runs afoul of the most fundamental principles of the First Amendment. *See Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980)(citation omitted): "As a general matter, 'the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'" *See also Carey v. Brown*, 447 U.S. 455, 461-64 (1980)(differential treatment of residential picketing in-

valid under strict scrutiny since applicability of provision "dependent solely on the nature of the message being conveyed"); *Perry Ed. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)("[f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975)("even a traffic regulation cannot discriminate on the basis of content").

The term "content" has a broad meaning under the law. It means not only that the state cannot differentiate in terms of the viewpoint being offered by the speaker, but also that it cannot differentiate in terms of the subject matter being discussed, regardless of the speaker's viewpoint. Thus, in both *Carey* and *Police Department v. Mosley*, 408 U.S. 92 (1972), labor picketing was allowed in front of certain buildings, but other demonstrations were not. The defect in the law was the fact that the only subject allowed to be aired at that place related to labor disputes, regardless of the point of view presented. That was sufficient to make the regulation a prohibited content-based law. In *FCC v. League of Women Voters*, 468 U.S. 364, a federal law prohibited noncommercial educational broadcasting stations receiving funds from the Corporation for Public Broadcasting from engaging in "editorializing." This Court held that the law was an invalid regulation based on the "content of the suppressed speech," since it prohibited a broad *category* of speech, regardless of the particular point of view expressed. *See also Boos v. Barry*, 485 U.S. 312 (1988).

Similarly, here, the only subject matter that triggers application of the law is a discussion of the crime. If the criminal author discusses his or her life in prison or before the crime, the law does not apply. This differential treatment of subject matter or category or content is precisely what this Court has condemned, absent a com-

pelling state reason, under the cases noted above.

Finally, the legislative background of the law indicates that its purpose was precisely to keep criminals from telling their story, *i.e.*, to suppress their expression, a goal which is presumptively unconstitutional. Whatever the validity of more general laws benefitting victims, the First Amendment prohibits the state from imposing a discriminatory financial burden on criminals for the very purpose of prohibiting them or inhibiting them from telling their stories.

When the state passes a law imposing financial burdens solely on criminals who write about their crime, the only conclusion that one can draw is that the state is seeking to suppress that type of expression. It does not want criminals writing about crime and seeks to discourage them from doing so by denying them any immediate financial reward if they do so. Indeed, when the state seeks to justify the law by saying that it is trying to keep a criminal from "benefitting" from his crime, it is implicitly admitting that it has precisely that purpose in mind. The inescapable conclusion from this type of differentiation is that the state is indeed attempting to suppress a certain type of expression (by imposing a particular burden on that message but not on others) written by a particular speaker (the criminal author).

The First Amendment prohibits the state from imposing that type of burden or acting with that purpose in mind. The state is simply disqualified from dictating the subjects that its citizens may discuss or who may discuss them. *See First National Bank v. Bellotti*, 435 U.S. 765.

II. RESPONDENTS CANNOT MEET THE STRICT SCRUTINY TEST IN THIS CASE

The "strict scrutiny" test requires that the state not only *argue* but *prove* that its regulation "is necessary to serve a compelling interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project*, 481 U.S. at 231. This Court noted in *Meyer v. Grant*, 486 U.S. at 1894: "[T]he State has *failed to demonstrate* that *it is necessary* to burden appellees' ability to communicate their message in order to meet its concerns" (emphasis added). In no way can the state offer a "compelling" reason for the law at issue here, nor can it show that the means chosen were "narrowly tailored" to achieve that end, nor can it "demonstrate" that "it is necessary" to burden a criminal author's ability to communicate in order to satisfy its interests in this case.

The requirement of showing a narrowly tailored as well as compelling reason applies both to the fact of *regulation* and the *distinctions* made by the law with respect to the First Amendment activity. *See Arkansas Writers' Project*, 481 U.S. at 231 (state must justify not taxation of the press generally, but differential taxation of the press). Thus, in this case, the state must show more than that the Son-of-Sam law could be invoked to compensate some victims of crime. It must show a compelling reason why it was necessary to limit the attachment and extension-of-limitations provisions in the law only to First Amendment generated income and only *from the publishing of books reenacting the crime*, and that the method it chose was "narrowly tailored" to compensate victims while not unnecessarily restricting First Amendment activities.

In sum, the state has the burden, and it is a "heavy" one, *id.*, of justifying its asserted reasons for focusing only on First Amendment generated income by pointing to concrete legislative facts to support the differentiation. Unlike the analysis employed under the rational relation-

ship test, the state cannot hypothesize some later justification and try to persuade a court to accept its *ad hoc* rationalization. *See, e.g., Meyer v. Grant*, 486 U.S. at 426, "No evidence has been offered to support that *speculation* [of the attorney general to support the law]" (emphasis added). Instead, the reasons offered are subject to the most careful scrutiny to see if there are real facts to support them, and if the reasons pass constitutional muster.

Based on this standard, the state cannot justify the present law. None of the reasons suggested by the Board meet the stringent test noted above.

A. The Desire To Compensate Victims

The general desire to assist victims is not enough to justify the law. If that were its only aim, the law is terribly inadequate and underinclusive. According to a recent report of the Board, the law has been invoked less than ten times in the eleven years of its operation, an average of less than one person helped per year. (The Board has attempted to apply the law in another five or six cases, including this case and the litigations described above).

By contrast, the total number of victims of crime in New York State is in the hundreds of thousands, if not the millions. In 1987, there were 53,733 sentences imposed after a felony conviction in New York State Caseload Activity Report, 1987, Office of Court Administration, and over the past ten years the rate has been steadily increasing. Assuming that there were an equal number of victims of such crimes for each person sentenced -- an assumption that in fact underestimates the number of victims, since criminals often have multiple victims -- the assistance given crime victims generally by the Son-of-Sam law is ludicrously inadequate, averaging one in 50,000. This imbalance between the universe of victims in the state and the narrow focus and reach of the law is

another indication that its true aim was not to compensate victims, but to suppress expressive activity by criminals.

B. The Desire To Compensate Victims From Assets Subsequently Obtained From Criminals

Another argument often asserted is that criminals are generally judgment proof and that it is a waste of time and money to bring a regular tort action immediately after the crime and collect a judgment, which will then be unenforceable. The state argues that victims rarely have the funds to bring a fruitless action on their own and need the assistance of the state to freeze the criminal author's assets. Subsequently acquired book and movie moneys may be a ready source of funds which the state can attach for the benefit of the victim.

To uphold the law on that basis, the state must show *in fact* that the current civil tort system for compensating tort victims is inadequate, and that there is a real problem of criminals obtaining large sums of money for selling their stories subsequently while their victims go uncompensated. Such facts must be presented to a legislative body and must at least be articulated to a court later examining the law.

There is absolutely no evidence to show that any of these hypotheses are true. Any victim of a tort may take advantage of the normal civil procedures for obtaining relief, *i.e.*, by bringing an action for wrongful death, assault, negligence and the like and securing a judgment against all the assets of the criminal tortfeasor, including the earnings from a book.

Indeed, in a case discussed in one of the affidavits in the record below, that is precisely what happened with respect to the earnings from a book entitled *In the Belly of the Beast*, written by John Henry Abbott. After writing that book (which did not discuss any specific crime)

and being released from prison, Abbott killed New York artist Richard Adan. Adan's estate brought an action for wrongful death and, prior to the civil trial, attached all of Abbott's royalties due with respect to that book under the normal content-neutral attachment provisions of the CPLR, which apply to all assets of a potential judgment-debtor. Thereafter, upon securing a judgment, the estate levied upon those proceeds.[7] Thus, the normal attachment-and-levy procedures of the CPLR were more than adequate to the task of assisting crime victims to obtain compensation, even against criminal authors.

In addition, the state must show that there is something unique about later acquired assets from books and movies that are different from later acquired assets in any other area, *i.e.*, money later inherited by a criminal or earned by a criminal as a locksmith, security expert, or computer-data thief based on skills developed as a criminal, or merely his regular wages earned in any other way. Furthermore, the state must show that the need for seizing such assets exists *only when the criminal author writes about the crime*.

There is absolutely no proof that any one of these hypotheses were true, either before the law was passed or since then. If the theory is that later acquired money by a criminal should be made available to victims by a special attachment procedure aided by a state agency even beyond the normal statute of limitations period, then why not apply it to *all later acquired* assets of a criminal? Surely the victim needs the funds just as much regardless of how the criminal may earn them later. What is unique about book and movie money in this regard? And what is unique about book and movie money *dealing only with the crime* that requires that only those assets be attached?

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[7] *See* Affidavit of Gerald Hollingsworth, ¶¶7-10, JA35.

Once again, the only possible conclusion one can reach is that the legislature did not want books published that were written by criminals about their crimes. It sought to discourage them from doing so by depriving them of compensation, if they did write and publish a book. Under the First Amendment, that is not an acceptable purpose for a law.

C. The Desire To Keep Criminals From Profiting From Their Crimes

Another reason offered for the law is the argument that criminals should not profit from their crime and a book which depicts the crime is somehow the "fruit" of that crime. While a legislator may vote for the law on that basis, a court simply cannot accept that reason as a justification for a law treading on First Amendment rights without the high evidentiary showing required under the First Amendment. There are at least four reasons why the fruits of literary activities cannot be considered the "fruits" of a crime.

1. Literary Royalties Do Not Flow Directly And Proximately From The Commission Of The Crime

It is true that New York State has ruled, as have all common law jurisdictions, that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime," *Riggs v. Palmer*, 115 N.Y. 506, 511 (1889). Thus, an individual who kills someone may not inherit from the estate of the person slain, nor collect from an insurance policy in which he may be named as a beneficiary. *In re Loud's Estate*, 334 N.Y.S.2d 969 (Surr.Ct. Kings Cty. 1972).

But in those situations the economic benefit flows directly from the illegal act, with no intervening events contributing to the gain. When a criminal steals a car or

robs a bank, the proceeds come to him directly from the illegal act. When he kills a testator and inherits from the will, nothing more needs to be done before the money goes to him. In that sense the proceeds are a direct product of the killing. But in no sense is a book on crime the "fruit" or "proceeds" of that crime under this analysis.

A book is the lawful fruit of the author's literary efforts, where a person sits down and engages in a creative activity -- writing -- which is condoned and even praised by society in every other context and is specifically protected by the First Amendment. Since the proceeds flow from this later act and not from the criminal activities that are described in the work, neither the automatic forfeiture provisions of state or federal law nor the common law rule applies.

2. The Writing Of The Book Is An Intervening Act That Breaks The Chain Of Causation From The Criminal Act That Is Its Subject Matter

Viewed from another perspective, the law in question seeks to obtain the proceeds from the *lawful writing by* the criminal, not from *the criminal acts of* the perpetrator. If a criminal commits an offense, the victim may press charges and sue him and, as explained above, the normal tort procedures are available. But only when he or she writes a book, and not for any other activity, are the extraordinary procedures now under question invoked.

Thus, the law operates only upon the *writing* phase of the criminal author's activity. But it is impossible to consider the lawful act of writing as an activity that can trigger the invocation of the criminal justice mechanism of a state. It is simply not an activity that can be condemned on its own or sanctioned through fine, attachment or forfeiture. Of course, to the extent that such a

lawful activity generates income, the proceeds of that activity can be reached in the same evenhanded way that other noncriminal assets of the criminal may be obtained. However, it cannot be considered any phase of the criminal activity of the writer.[8]

3. The Reasoning Behind The Law Sweeps Too Broadly

To say that the fame created by a criminal act is the fruit of that act and therefore any economic benefit that flows from that fame is the fruit of the crime is to stretch the meaning of the term beyond any recognition. Each of our last five Presidents (Johnson, Nixon, Carter, Ford and Reagan) became famous because of their governmental service. Each wrote a book about their term of office, for which they were paid millions of dollars. Is the fame that they acquired as President the "fruit" of their service as President? If so, they cannot collect any royalties on their books since the Constitution prohibits a President from receiving any "emolument" from his service other than his salary. U.S. Constitution, Art. II, Sect. I. Cl. 5. Lee Iaccoca became famous because of his service as President of Chrysler, and wrote a best seller which earned millions of dollars. Does the company, or its shareholders, have a claim to his royalties since his fame was the "fruit" of his labors at Chrysler? If a judge wishes to write a book about his service, the state that he worked for does not own the copyright in the book, nor can it make any claim to his royalties even though the judge was placed in that position by the state and may have become famous and expert because the state so employed him.

We have always considered the reasons why a per-

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[8] To the contrary, writing can and should be regarded as "an intervening cause that broke the causal link" between the crime and the monies earned from book royalties. *Ross v. Oklahoma*, 487 U.S. 81, 96 (1988).

son became famous to be distinct from any activities he engages in to earn money once he achieved that status. Many persons became famous and develop expertise in an area in which they are employed (government service, entertainment, business, academia) and then write about those experiences. But we have never required such persons to surrender the proceeds of their books to the employer who put him in that position on the ground that the royalties are the "fruit" of the fame which his employment brought about. That is simply not the law. The writing of his book is considered an act independent of his service, employment and fame. A criminal has to pay for his crime through the punishment imposed, but the fact that he or she becomes famous as a result of the crime and that economic benefits result from that fame has never triggered any forfeiture theory -- until the Son-of-Sam law was passed.

4. The Law Reaches Books And Writings Not Within Its Aim

The alleged purpose of the law was to reach funds from "famous" criminals who, it was expected, could profit from their notoriety. As the sponsor said, a criminal may "gain substantial financial benefits related to resulting publicity" from his famous crimes. The law was designed, therefore, to prevent criminals from exploiting their criminal activity through profits gained by selling their crime stories. But the law in question does not reach merely "famous" crimes or exploitative criminals. It reaches all crimes that a person writes about, regardless of whether they made him famous or not.

Thus, if Herman Melville or Jack London committed some minor crimes in their youth and then made them the subject of books written twenty years later, the proceeds of those books are treated exactly the same as a "Son-of-Sam" exploitative work. If Malcolm X writes about his burglary of twenty years before, which generated no publicity of any kind when the events occurred,

he also is subject to the law. The law assumes that every book that discusses a crime must be the kind of exploitative work that the sponsors feared, even though there are literally thousands of books by criminals that add to our understanding of society and do not fall in that category.[9] Such a total divergence between the intent of the sponsors and the reach of the law reinforces the sense that the statute is, at once, too broad and too narrow.

D. The Need To Keep A Criminal From Profiting From The Exploitation Of His Or Her Crime While The Victims Of The Crime Are In Need of Compensation

Finally, the Second Circuit found another "compelling reason" to sustain the law beyond those offered by the state itself. The court held:

> Our society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime.

916 F.2d at 782. The Second Circuit went on to note that the sort of law enacted by New York prevents a criminal's unjust enrichment, satisfies a victim's sense of justice and desire for retribution and increases the criminal's awareness of the crime.

> [T]he statute recognizes that the only way a criminal can profit directly from a specific crime involving a particular victim, other

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[9] There exists a fifty-three page bibliography of hundreds of writings by "criminals" and a discussion of their importance. *See* Franklin, *American Prisoners and Ex-Prisoners: Their Writings* (1982). Many if not most of the books would have been subject to the Son-of-Sam law if it had been in existence at the time.

> than by obtaining any proceeds of the crime itself, is by writing or talking about or re-enacting it. The statute also recognizes that, as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes.

Id. at 783.

There are a number of observations that must be made about the Second Circuit's creative effort to save the law in question.

First, the court simply combined the three interests that were separately identified to justify the law into a single compound purpose. Thus, as discussed immediately above, the state previously identified three interests served by the law: (1) the need to compensate victims generally, (2) the need to compensate victims from after acquired assets of a criminal, and (3) the need to keep a criminal from profiting from the crime. The new combined or compound interest becomes the need-to-keep-criminals-from-profiting-from-exploitation-of-their-crimes-through-after-acquired-profits-from-their-books-while-the-victims-are-not-yet-compensated. But the fallacies that doomed each of the separate interests also doom the combined interest as well. The premise of the new compound interest is still that the criminal is profiting from the crime when he or she writes a book. If a book is not the fruit of the crime, then the entire premise of this new interest falls. For the reasons stated above, *amici* do not believe that a book is the fruit of the crime that made the author famous.

Second, as a matter of constitutional law, the creation of the "compound" interest referred to makes a mockery of the compelling state interest test. What the Second Circuit did below is to focus only on what the law covers and to see whether it could justify that purpose as compelling. Does the state have an interest in

having criminal authors pay to their victims, after-acquired royalties that discuss the crime? If that were the only focus, the answer might be "yes." But the minute the focus is broadened -- to ask what is not covered by the law -- then the defects of the law become apparent. If the question becomes: "Does the state have an interest in having criminal authors pay to their victims after-acquired royalties that discuss the crime *while permitting the criminal to write on any other subject without penalty,*" then the content-based nature of the law is obvious. Similarly, if the question is phrased: "Does the state have an interest in having criminal authors pay to their victims after-acquired royalties that discuss the crime *while not trying to reach any other after-acquired asset of the criminal,*" then the First Amendment violation becomes clear.

If the Second Circuit's approach were correct, then the rule requiring that a compelling state interest must be shown before a content based distinction can be upheld disappears entirely. For example, this Court in *Arkansas Writers' Project* examined a state law which placed a tax on general circulation publications but exempted religious, professional, trade and sports magazines. If the question were only: "Should general circulation magazines pay a sales tax," the answer is obviously, "yes." But if the question becomes: "Should general circulation magazines pay a sales tax *while sports and religious magazines do not pay such a tax*," then the answer is different.

Similarly, in *Boos v. Barry*, 485 U.S. 312, this Court examined a federal law that prohibited picketing within 500 feet of an embassy when the demonstration *criticized* the foreign government involved, but allowed such demonstrations if the picketing was favorable. Once again, if the focus were only on banning *all* demonstrations in front of an embassy, a case could be made that international relations required such a restriction. But if

one compares the types of demonstrations that are allowed and those that are prohibited, the content-based distinction becomes apparent and the law was properly invalidated.

The point of these cases is that the compelling state interest test cannot be so easily evaded. The approach of the Second Circuit undercuts any attempt to deal with content-based laws. By focusing only on the justification for the restraint on the person who is covered by the law, and paying no attention to the speech that is allowed or the other persons left free to speak, all content-based prohibitions disappear. Only by such a radical attack on basic First Amendment principles can the Son-of-Sam Law be upheld.

Finally, the factual assertions on which the Second Circuit rested its new "compelling state interest" analysis are demonstrably untrue. Thus, the court asserted that "§632-a deals with readily identifiable, locatable funds that are *commonly* available to those who victimize others," 916 F.2d at 784 (emphasis added). But, as *amici* pointed out above, there are at least 50,000 crime victims a year from felonies alone in New York State, yet the Son-of-Sam Law has been invoked less than ten times in the twelve years it has been in existence. Moreover, the Crime Victims Board has attached, or sought to attach, assets from only about seven or eight criminal authors. To talk about such funds as "commonly available to those who victimize others" is absurd.

Ultimately, the Second Circuit's conclusion depends upon the premise that there are thousands of criminals who commit crimes only so that they can write a book about how they felt while they were committing their crimes. Such a surmise is simply untenable. It assumes that there are greedy publishers whose chief goal is to make money from a criminal gloating over his deeds and that the ghoulish public will readily buy such material. The experience in New York State both before and after

the law was passed shows that no such program exists. Since, under the strict scrutiny test, it is the state's burden to demonstrate by real evidence and not by speculation and conjecture that criminals "commonly" have and exploit this asset, its failure to present any evidence to support any part of this hypothesis is fatal to its defense of the law.

If New York were genuinely interested in compensating crime victims, it could to so in a variety of ways that would undoubtedly survive constitutional review. Instead, New York has enacted a statute that focuses exclusively on expressive activity without providing the overwhelming majority of crime victims with any meaningful chance for restitution. That imbalance dooms this statute under the First Amendment. It does not and should not doom future efforts to compensate crime victims in New York or elsewhere.

CONCLUSION

For the foregoing reasons, the decision below must be reversed and New York Executive Law §632-a must be declared unconstitutional.

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IN THE
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SIMON & SCHUSTER, INC.,
Petitioner,
v.
MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether New York Executive Law § 632-a violates the First Amendment to the U.S. Constitution.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. These organizations and their members have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments.

This case presents questions concerning the constitutionality of state legislation designed to ensure that criminals do not profit from their crimes before their victims have had an opportunity to satisfy civil judgments out of such profits. Among other things, this legislation eases the burden of victim compensation that would otherwise fall on the State's treasury. The great majority of States have comparable legislation. *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

1. Over the past 25 years the State of New York has enacted a comprehensive statutory scheme to provide financial assistance to crime victims. *See* N.Y. Exec. Law §§ 630-635 (McKinney 1982 & Supp. 1990).[2] The initial legislation created a five-member Crime Victims Board ("Board") to make awards from state funds to crime victims for medical expenses, counseling needs, burial expenses, lost earnings and the loss of essential personal property incurred as a result of crime. *Id.* at §§ 626, 631.

In 1977, the Legislature added to the victim compensation scheme a provision for "Distribution of Moneys

[1] The parties' letters of consent have been filed with the clerk pursuant to Rule 37.3 of this Court.

[2] The New York Legislature defined the purpose of the statutory scheme as follows:

> The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent upon public assistance. The legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.

N.Y. Exec. Law § 620.

Received as a Result of the Commission of a Crime." *See* N.Y. Exec. Law § 632-a. The Legislature articulated the purpose of § 632-a as follows:

> Currently a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.

Assembly Bill Memorandum Re: A9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, N.Y. Laws of 1977, ch. 823.

Section 632-a creates a mechanism for escrowing money owed to a person accused or convicted of a crime who sells a "reenactment" of the crime or an account of his or her "thoughts, feelings, opinions or emotions regarding such crime." N.Y. Exec. Law § 632-a(1).[3] The section also applies to any person who voluntarily and intelligently admits to the commission of a crime for which he or she is not prosecuted. *Id.* at § 632-a(10)(b). The money remains in escrow for five years, during which period the criminal may have immediate access to as much as twenty percent for "retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process." *Id.* at § 632-a(8). The Board may also permit payments from this twenty percent "for the necessary expenses of the production of the moneys paid into the escrow account." *Id.*

Crime victims may not make a claim directly upon the remaining funds that are held in escrow, but must instead first secure a civil judgment for damages against the criminal. *Id.* at § 632-a(1). The escrow fund, moreover, exists

[3] Where an escrow account is established for a person accused of a crime, the funds are immediately returned upon dismissal of the charges or acquittal. N.Y. Exec. Law § 632-a(3).

solely to satisfy claims for injuries suffered as the result of crime, not for injuries arising from any subsequent rendition of the crime. *Id.; see also id.* at § 621(3) (defining "Crime" for the purpose of establishing victim entitlement to escrow fund monies).

To guard against any abuse by the Board in the distribution of escrowed funds, the statute provides for judicial review of any determination with respect to such distributions. *Id.* at §632-a(12). The Board has also promulgated regulations providing for administrative and judicial review of its initial determination that certain contractual arrangements are covered by the statute. *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 526.1 (1985).

2. On May 7, 1991, the New York Court of Appeals upheld the constitutionality of § 632-a. *Children of Bedford, Inc. v. Petromelis*, No. 77, slip op. (N.Y. May 7, 1991). In so doing, the court determined that the statute served five compelling governmental interests: the compensation of crime victims; the compensation of victims by their victimizers rather than by the State; the preservation of the victim's equitable right to assets earned by a criminal as a result of the victimization; society's fundamental belief that it is wrong for criminals to "salt their victims' wounds" by profiting from their victimization without recompense to the victims; and the equitable principle that criminals should not be permitted to profit from their wrongs. *See Children of Bedford*, slip op. at 13-16. The court rejected the contention that the statute was intended to protect the victim's or the public's "sensibilities" from offensive speech. *Id.* at 15 n.2. It held, moreover, that New York's tort and attachment laws are "unsuitable to protect the needs of crime victims." *Id.* at 18. It also held that the assets a criminal might earn by means other than recounting crimes fell outside the purposes of § 632-a, "which is intended to protect the victim's equitable claim to profits earned by a criminal from speech made possible by reason of their victimization." *Id.* at 19.

SUMMARY OF ARGUMENT

Section 632-a does not restrict or prohibit a criminal's speech about crime or any other subject. Its constitutionality is to be evaluated according to the principles enunciated in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and reaffirmed in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *City of Renton* sets forth the analytical framework for assessing the constitutionality of regulations that, while they accord differential treatment to certain speakers or speech, are enacted to achieve substantial governmental interests unrelated to the suppression of free expression.

Section 632-a satisfies each component of the *City of Renton* analysis. First, it is designed to serve New York's compelling interest in eliminating the injustice created when criminals profit from their crimes before the victims have had an opportunity to satisfy civil judgments against the criminals via a recovery from those profits.

Second, § 632-a does not foreclose any avenues of communication. The New York statute is fundamentally different from the Colorado criminal statute invalidated in *Meyer v. Grant*, 486 U.S. 414 (1986). The Colorado statute severely restricted political speech by prohibiting the speaker from spending money to circulate that speech. By contrast, § 632-a does not impose any limits on a criminal speaker's ability to circulate his message or on the media's ability to publicize that message. The financial limitations imposed by § 632-a on criminal speakers are comparable to the limitations upheld in *City of Renton, Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), *Buckley v. Valeo*, 424 U.S. 1 (1976), and other decisions involving economic disincentives to the exercise of free speech and other constitutional rights.

Finally, under the standards of *City of Renton* and *Ward*, § 632-a is "tailored" to serve the State's purposes.

Section 632-a is necessary because New York's tort and attachment law "address concerns wholly irrelevant to crime victims and the requirements for their use make them unsuitable to protect the needs of crime victims now covered" by the statute. *Children of Bedford*, slip op. at 18. Although the statute does not extend to nonexpressive assets of criminals or to expressive assets realized from non-crime related works, it is not underinclusive because those assets do not implicate the State's interest in eliminating the injustices to victims that the statute is designed to address. Nor is the statute overinclusive. It is no more inclusive than the zoning ordinance upheld in *City of Renton*, and its scope has been given a narrow reading by the New York courts.

ARGUMENT

SECTION 632-a IS CONSTITUTIONAL BECAUSE ITS JUSTIFICATION IS UNRELATED TO THE SUPPRESSION OF FREE EXPRESSION, IT SERVES A SUBSTANTIAL GOVERNMENTAL INTEREST, AND IT DOES NOT FORECLOSE ANY AVENUES OF EXPRESSION

I. The Constitutionality Of Section 632-a Is To Be Determined According To The Principles Of *City Of Renton* And Its Progeny

A. *Under City* of Renton *A Regulation Of Speech Is Deemed Content Neutral If It Is Justified Without Reference To The Content Of The Regulated Speech*

Section 632-a does not prohibit the speech of anyone on any subject, and it does not prohibit payment to anyone for expression on any topic. Rather, it creates an escrow mechanism that delays for five years partial payment to perpetrators of crimes for speech based on those crimes, thereby providing crime victims with an opportunity to satisfy civil judgments redressing injuries suffered as a result of those crimes. Any net reduction in

the criminal's expressive profits derives from the criminal conduct, not from his speech. The statute imposes no financial charge on speech; it merely makes the proceeds of speech available to defray judgments against the criminal attributable to the criminal conduct that makes the speech possible.[4]

For these reasons, the analytical framework for determining the statute's constitutionality is provided by *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and its progeny. *City of Renton* addressed the constitutionality of a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. 475 U.S. at 43. The Renton ordinance defined the targeted group of speakers solely by reference to the content of the "visual media" such speakers presented. *Id.* at 44.[5]

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[4] If the criminal conduct has no victims to press monetary claims, the proceeds of speech are not affected. *See Halmi v. New York State Crime Victims Board*, 12 Media L. Rep. (BNA) 2388 (Sup. Ct. N.Y. Co. 1986), N.Y.L.J. June 5, 1986, p. 12, col. 3, *aff'd on opn. below*, 128 A.D.2d 411, 512 N.Y.S.2d 650 (1st Dept. 1987). If the crime's victims do not come forward within the statutory five-year period, the sums in the escrow fund are returned to the criminal. *See* Exec. Law § 632-a(4).

[5] The ordinance defined "adult motion picture theater" as any building " 'used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by any emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein.' " *Id.* at 44 (citation omitted).

There is no basis for declining to apply the *City of Renton* analysis here merely because *City of Renton* dealt with the regulation of sexually explicit speech. The First Amendment protects sexual expression as long as it is not obscene. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

The Court recognized that the Renton ordinance "treats theaters that specialize in adult films differently from other kinds of theaters." *Id.* It found, however, that the ordinance was not "aimed at the *content* of the films" but at "the *secondary effects* of . . . [adult] theaters on the surrounding community." *Id.* at 47. Renton's "predominate intent" was "unrelated to the suppression of free expression." [6] The ordinance was therefore "completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" *Id.* at 48 (citations omitted).[7]

The Court has subsequently reaffirmed that the *City of Renton* analysis is to be "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). In *Ward*, a New York City ordinance regulating the use of sound amplifiers in a city-owned bandshell was found to be content-neutral because it was "'*justified* without reference to the content of the regulated speech.'" *Id.* at 791 (citations omitted). The *Ward* Court held that the test for a "content-neutral" regulation was

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[6] The City's "predominate intent" was, the Court found, articulated in the text of the ordinance:

> The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views.

City of Renton, 475 U.S. at 48 (citation omitted).

[7] The Court suggested that if Renton had intended to restrict "'the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.'" *City of Renton*, 475 U.S. at 48, *quoting Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 82 n.4 (1976) (Powell, J., concurring).

> whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

Id. (citations omitted). Under the analytical framework of *City of Renton* and *Ward*, §632-a is content neutral.

B. *Section 632-a Is Content Neutral Because It Is Justified Without Reference To The Content Of The Speech It Regulates And Its Justification Is Unrelated To The Suppression Of Free Expression*

Section 632-a does not prohibit any speech. Its "justification," moreover, is "unrelated to the suppression of free expression." *City of Renton*, 475 U.S. at 48; *see also Ward*, 491 U.S. at 791. The purposes of § 632-a are to "facilitat[e] compensation" to crime victims; to further "the State's interest in having criminals, rather than taxpayers, bear the burden of compensating their victims whenever possible"; and "to preserve the victim's equitable right to assets earned by a criminal as a result of the victimization." *Children of Bedford*, slip op. at 13-14. The statute is also "a codification of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs." *Id.* at 15 (citing *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989)).

New York's regulation of payment for the affected speech is justified entirely without reference to the content of the speech. The statute was enacted to regulate the use of money made from the exploitation of crime through speech, rather than to regulate speech. Like the Renton ordinance, whose predominate concern was "the secondary effects of adult theaters," 475 U.S. at 47, the

predominate concern of Section 632-a is compensation of crime victims.

Simon & Schuster argues that the justification for the New York statute is impermissibly content-based because the statute was designed to protect crime victims from secondary psychological harm arising from speech. *See* Pet. Br. 24-25.[8] The New York Court of Appeals expressly rejected this argument. *See Children of Bedford*, slip op. at 15 n.2 ("The statute's purpose is to compensate crime victims not to protect their sensibilities."). Even if this concern had been a motivating factor in the enactment of § 632-a, however, the Legislature's *predominate* intention was not to suppress speech. *See Children of Bedford*, slip. op. at 13-14. Moreover, the existence of such "a motivating factor" would not justify invalidation of the statute. *See City of Renton*, 475 U.S. at 47-48, citing *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968).

II. Section 632-a Is Constitutional Under The Analysis Prescribed By *City Of Renton*

City of Renton articulates a three-part inquiry. First, the statute must be "designed to serve a substantial governmental interest." *City of Renton*, 475 U.S. at 50 (cita-

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[8] Simon & Schuster relies solely on the statements of one legislator to establish the existence of the allegedly improper motivating factor for the enactment. Pet. Br. 24. As this Court has made clear, however,

> "[W]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."

City of Renton, 475 U.S. at 48, quoting *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968).

Under the *City of Renton* analysis, if New York had actually wished to suppress speech it would (for example) have prohibited criminals from selling their stories to the media. *See City of Renton*, 475 U.S. at 48; *American Mini Theatres*, 427 U.S. at 82 n.4 (Powell, J., concurring).

tions omitted). Second, it must "allow for reasonable alternative avenues of communication." *Id.* Finally, it must be "narrowly tailored" to affect only the category of speakers that produces the undesirable secondary effects the regulation was designed to combat. *See id.* at 52 (citations omitted). Section 632-a satisfies each part of this inquiry.

A. *Section 632-a Serves A Compelling Governmental Interest*

The court below correctly identified the compelling governmental interest at stake in this case:

> It cannot be gainsaid that the state has a very strong interest in preventing criminals from profiting from their crimes. But the state has a much stronger, indeed a compelling, interest in assuring that a criminal not profit from the exploitation of his or her crime while the victims are in need of compensation by reason of their victimization.

Pet. App. 13a (citations omitted). *See also Children of Bedford*, slip op. at 13-16. Simon & Schuster does not dispute the importance of this governmental interest. *See* Pet. Br. 28.

B. *Section 632-a Does Not Foreclose Any Avenues Of Expression*

1. *Section 632-a Does Not Impose Economic Burdens on the Circulation of Speech*

Because § 632-a prohibits no speech, a criminal speaker wishing to recount his or her crimes has an unfettered opportunity to do so. In petitioner's view, however, that opportunity is limited because the State regulates payment for the speech and, for purposes of constitutional analysis, speech and the payment for speech are indistinguishable. *See* Pet. Br. 13 ("[T]he right to make payments essential to *Wiseguy's* creation is constitutionally protected"). There is, however, no constitutional right to immediate payment for speech, and none of this

Court's decisions support petitioner's far-reaching claim of constitutional "right."

In support of its assertion, Simon & Schuster relies principally upon *Meyer v. Grant*, 486 U.S. 414 (1988). *Meyer* invalidated a Colorado criminal statute that prohibited the compensation of initiative or referendum petition circulators. The statute imposed a draconian limitation on political speech: its direct effect was to prevent a "speaker" (the sponsor of an initiative or referendum proposal) from publicizing his message by prohibiting him from paying people to circulate that message. Unlike the Colorado statute, § 632-a imposes no limitations, financial or otherwise, on the right of speakers or their publishers to circulate the criminal's ideas.[9]

The press tax cases on which Simon & Schuster relies are likewise inapposite. *See* Pet. Br. 21-22, *citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). Both cases concerned state tax levies that imposed economic burdens on certain members of the press but not on non-press businesses or on other members of the press. Section 632-a, however, imposes no such burden on the press. Neither a publisher like Simon & Schuster, nor a writer like Nicholas Pileggi, nor a literary agency like Sterling Lord, is taxed or economically burdened by § 632-a.[10]

[9] Simon & Schuster's reliance on other decisions invalidating regulations prohibiting expenditures to circulate expressive messages is similarly unavailing. *See* Pet. Br. 18 n.15, *citing Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumberg v. Citizens For a Better Env't*, 444 U.S. 620 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978). In each of these cases, the regulations at issue prevented certain speakers—in *Bellotti*, corporations; in *Riley*, *Munson* and *Schaumberg*, charities—from spending money to circulate their views under any circumstances.

Moreover, both *Meyer* and *Bellotti* involved political speech, the category of speech that "is at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776. *See also Meyer*, 486 U.S. at 421-22; *Buckley v. Valeo*, 424 U.S. at 14.

2. *Any Economic Disincentive To Speak Arguably Created by Section 632-a Is Constitutionally Permissible*

In Simon & Schuster's view, § 632-a is unconstitutional because it creates a disincentive for criminal speakers to sell their stories to the media. *See* Pet. Br. 19-20. As a result, the media will lose the opportunity to make profits from such stories, and the public will be deprived of those stories. *See id.* 18-21.

The basis for this argument is the unsupported assumption that § 632-a discourages criminals from cooperating with publishers. Simon & Schuster elevates this assumption to an article of faith, declaring that "the record shows without contradiction" that Henry Hill would not have cooperated in the production of *Wiseguy* without the timely and full payment of the monies due him under the Publishing Agreement. Pet. Br. 2-3. The record, however, shows no such thing. It is devoid of any statement by Hill or any other criminal speaker.[11] The trial

[10] The only reason that the Board imposed any financial burden on Simon & Schuster in this case is because the publisher failed to abide by the statutory requirements that it submit to the Board its contract with Hill, and all payments due Hill if Hill himself refused to comply with the Board's Order. *See* J.A. 54; Pet. App. 29a.

[11] The record contains affidavits of several publishing executives, author Nicholas Pileggi, and literary agent Sterling Lord speculating that criminals will not tell their stories because of § 632-a. J.A. 13-47.

In fact, several notorious criminal speakers, including David Berkowitz (the "Son of Sam" killer), Gary Gilmore, and Joan Harris, have based their decision to speak about their crimes on reasons other than the profit motive. *See* J.A. 111, 112 (Ber-

court correctly concluded that because of Simon & Schuster's failure to comply with the statute, "we will never know whether or not Hill would have cooperated." Pet. App. 36a. There is thus little or no evidence that § 632-a creates a disincentive to speech. Under similar circumstances—a case involving mixed evidence concerning an alleged threat to the marketplace of ideas—this Court declined to invalidate a limitation on an asserted First Amendment right. *See Branzburg v. Hayes*, 408 U.S. 665 (1972).[12]

The Court has repeatedly upheld regulations that create economic disincentives to speech and the exercise of other constitutionally protected rights. For example, the Court recently reaffirmed that regulation is not constitutionally suspect because it decreases the financial capacity to exercise or enjoy a constitutional right. In upholding a federal drug forfeiture statute against a Sixth Amendment challenge in *Caplin & Drysdale*, 491 U.S. 617, the Court directly addressed the argument that the forfeiture provision deprived the petitioner of assets necessary for the full enjoyment of his constitutionally pro-

kowitz); Comment, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353, 1364 n.74 (1988) (Gilmore); *Children of Bedford*, slip op. at 1 (Harris). *See Criminal Antiprofit Laws* at 1364-65 (statutes such as § 632-a do not create a disincentive to criminals' speech); Comment, *In Cold Type: Statutory Approaches to the Problem of the Offender as Author*, 71 J. Crim. L. & Criminology 255, 260 (1980) (same).

[12] In *Branzburg*, the press sought constitutional protection against compulsory grand jury testimony regarding its confidential sources on the ground that without such protection, confidential sources would not speak to the press and the public would thereby be deprived of important information. 408 U.S. at 693. There was no clear evidence in *Branzburg* concerning the claimed deterrent effect on sources. *Id.* Even accepting as fact the press' deterrence claim, however, the *Branzburg* Court concluded that any net loss in information available to the public could not overcome the state's substantial interest in the pursuit and prosecution of crime. *Id.* at 695.

tected right to counsel. In the Court's view that economic deprivation was not a constitutional defect:

> While petitioner and its supporting *amici* attempt to distinguish between the expenditure of forfeitable assets to exercise one's Sixth Amendment rights, and expenditures in the pursuit of other constitutionally protected freedoms, there is no such distinction between, or hierarchy among, constitutional rights. If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as fully as he might otherwise. Nonetheless, we are not about to recognize an antiforfeiture exception for the exercise of each such right.

Id. at 628 (citations omitted).

Consistent with these principles, the Court has regularly upheld economic disincentives comparable to § 632-a. In *City of Renton* the Court found the zoning ordinance to be constitutional even though the effect of that ordinance was arguably to relegate adult theaters to a small portion of the city where there were no "commercially viable" adult theater sites. *See* 574 U.S. at 53. That economic disincentive to speak did not constitute a "substantial restriction" on speech for constitutional purposes. *See id.* at 54. In so holding, the Court reiterated that "'the inquiry for First Amendment purposes is not concerned with economic impact.'" *Id.* (citation omitted).[13]

[13] The Court has repeatedly upheld regulations that created economic disincentives for expression. *See, e.g., Rust v. Sullivan*, 59 U.S.L.W. 4451 (U.S. May 23, 1991) (upholding regulation conditioning federal funding for family planning services on limitation on speech concerning abortion); *Leathers v. Medlock*, 111 S.Ct. 1438 (1991) (upholding tax on cable TV operators that did not affect other members of the media); *Austin v. Michigan*

The Court reached a similar conclusion in the political speech context in *Buckley v. Valeo*, 424 U.S. 1, when it upheld the campaign contribution limitations imposed by the Federal Election Campaign Act of 1971 ("FECA"). The constitutionally permissible limitation on political contributions in *Buckley* is analogous to the limitation on payments to criminal speakers here. Like a contribution to a political candidate, which facilitates that candidate's ability to express his or her views, the payment by a publisher to a criminal speaker arguably facilitates the criminal's ability to speak.[14] Even in the core area of political

Chamber of Commerce, 110 S. Ct. 1391 (1990) (upholding state prohibition on corporate political expenditures); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985) (upholding restriction on participation of charitable organizations in combined federal charity drive); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (upholding differential tax burden on charitable institutions based on the amount of lobbying they undertake); *FEC v. Right To Work Committee*, 459 U.S. 197 (1982) (upholding federal ban on soliciting political contributions from non-members); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (upholding cause of action for damages against the press for infringement of "right of publicity"); *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (upholding Sunday blue law against "free exercise" challenge even though the regulation "as applied to appellants, operates to make the practice of their religious beliefs more expensive"); *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (upholding ban on door-to-door soliciting without invitation even though the regulation imposed an economic burden on solicitors); *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) (upholding ban on sound trucks even though "more people may be more easily and cheaply reached by sound trucks").

[14] Simon & Schuster frequently cites *Buckley* in support of its challenge to § 632-a because *Buckley* invalidated FECA's limitation on independent expenditures in support of candidates. An independent expenditure for a political candidate, however, is not analogous to a publisher's payments to criminal speakers for the criminals' speech. A proper analogy to an independent political expenditure would be an expenditure by a publisher to promote the "message" of a criminal speaker or to promote the publisher's ideas concerning that criminal speaker. Section 632-a imposes no limits whatsoever on such expenditures. Its only limitation is on the amount a publisher can "contribute" to the criminal speaker for the criminal's speech.

speech, however, the Court decided that limits on such payments "entail[] only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 20-21, and insufficiently restrict the speech of the recipient of the contribution (the candidate) to invalidate the limitation. *See id.* at 21.

In his concurring opinion in *Buckley* Justice White took this analysis a step further, highlighting the fact that FECA regulated the "giving and spending of money, acts that have First Amendment significance not because they are themselves communicative with respect to the qualifications of the candidate, but because money may be used to defray the expenses of speaking or otherwise communicating." *Id.* at 259. The very giving of money, however, was the circumstance that gave rise to the undesirable consequences that FECA was designed to correct, the purchase and sale of public office or the appearance thereof. *Id.* Because giving money is not in and of itself "speech," that conduct could be regulated; such regulation was not suspect because it prevented the accumulation of funds otherwise available for speech. *Id.* at 262.

Justice White's analysis is particularly pertinent here. New York and the forty other states with similar laws regulate the payment of money for criminal speech not because they regard that speech as undesirable, but because the *payment of money* to criminal speakers before their victims are compensated is an "undesirable consequence" the States seek to regulate. Like the contribution limitations upheld in *Buckley*, New York's regulation is not constitutionally infirm merely because it may diminish the amount of money realized by criminals for speech.

C. *Section 632-a Is Narrowly Tailored To Serve The State's Compelling Purpose*

In requiring that a regulation of speech be narrowly tailored to fit its content-neutral purpose, the *City of Renton* Court limited the required "tailoring" analysis to a determination of whether the regulation was confined to the speakers that produced undesirable "secondary effects": "[T]he Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)." 475 U.S at 52

In *Ward* the Court further particularized the tailoring requirement. It first reaffirmed that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." 491 U.S. at 794, citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949). Consequently, it rejected once and for all the notion that such regulation must be the least restrictive means of achieving the desired end:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least-restrictive or least intrusive means of doing so. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative.

Ward, 491 U.S. at 798-800. On the contrary,

> [T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial

> government interest that would be achieved less effectively absent the regulation.'

Id. at 799, *quoting United States v. Albertini*, 472 U.S. 675, 689 (1985).

Simon & Schuster asserts three "tailoring" objections to § 632-a, contending that it is simultaneously unnecessary, underinclusive and overinclusive. The tailoring analysis of *Ward* defeats each of these objections.

Although Simon & Schuster accepts the proposition that payments due criminals for expression may be attached to satisfy victims' claims, *see* Pet. Br. 30, it objects to the State's method of achieving that end on the ground that § 632-a is not "necessary." *Id.* at 28. This argument is simply a disagreement with New York's policymakers over how best to achieve a concededly valid end. The contention must be rejected on the basis of the express directive against such policy critiques in *Ward*. *See* 491 U.S. at 800.

At the same time, this contention is legally erroneous. According to Simon & Schuster, § 632-a is unnecessary because New York already has tort law, a prejudgment attachment statute and restitutionary and forfeiture provisions to deliver such funds to crime victims. Pet. Br. 28. However, the New York Court of Appeals has analyzed New York's tort and attachment law and has concluded that "[t]hese provisions address concerns wholly irrelvant to crime victims and the requirements for their use make them unsuitable to protect the needs of the crime victims now covered by Executive Law § 632-a." *Children of Bedford*, slip op. at 18. Simon & Schuster and its supporting *amici* themselves refute their own contention that § 632-a is unnecessary in light of New York's existing system for criminal restitution and forfeiture. As they correctly observe, "[n]either common law nor statutes have included payments for speech within the general definition of the fruits or proceeds of crime subject to restitution or forfeiture." Pet. Br. 34-35; *see also* Brief

Amicus Curiae of the American Civil Liberties Union at 19-32. Section 632-a is necessary because none of New York's alternative methods for reaching criminal assets are adequate for the purposes served by the statute.

Simon & Schuster's underinclusiveness and overinclusiveness arguments, *see* Pet. Br. 38-40, are also unpersuasive.[16] Simon & Schuster contends that the statute is underinclusive because it does not reach non-expressive assets of criminals or expressive assets from works on subjects not covered by the statute. Pet. Br. 31, 38-39. This argument fails because it misperceives the purpose of § 632-a. The statute was "intended to protect the victim's equitable claim to profits earned by a criminal from speech made possible by reason of their victimization." *Children of Bedford*, slip op. at 19. Profits a criminal may realize from consulting, from expressive works on topics other than the victimizing activity, or from inheritance or other after-acquired assets obviously do not implicate the State's interest in eliminating the injustice that the statute is designed to address. *See id.* at 18-19.[15]

Simon & Schuster contends that the statute is overinclusive because it applies to works that deal only in part with the statutory subjects. Pet. Br. 40. This argument is also meritless. The fact that § 632-a applies to works that discuss both crimes and subjects other than those covered by the statute does not distinguish it from the constitutionally valid ordinance in *City of Renton*, which applied to adult motion picture theaters even if such theaters also showed films that did not fit the statutory definition of "adult" material. *See* 475 U.S. at 44.[17]

[15] Simon & Schuster's underinclusiveness argument, and the similar position of the dissent below, are based in part on the assumption that a criminal's story is not typically the criminal's sole or even primary asset. Pet. Br. 31, 38-39; Pet. App. 21a. Scholarly studies belie that assumption. *See* R. Reiff, *The Invisible Victim: The Criminal Justice System's Forgotten Responsibility* 137 (1979) (ninety percent of convicted criminals have annual incomes of less than $5,000 at the time of arrest; over half are unemployed at the time of arrest); R. Meiners, *Victim Compensation* 3 (1978) (few apprehended criminals have the resources to pay the cost of the damages they have inflicted).

[16] Neither of these contentions addresses the focal point for "tailoring" analysis: whether "'the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799, *quoting Albertini*, 472 U.S. at 689. Section 632-a satisfies that requirement because it filled a gap in the existing statutory structure that made it substantially more difficult for victims to levy on criminals' profits.

[17] The suggestion of overinclusiveness is also refuted by the holding of the New York courts that the statute does not apply to works by criminals that make only incidental and *de minimis* reference to the crime. *See Application of Jean Harris v. Abate*, Index No. 89/24246 (Sup. Ct. 1990), N.Y.L.J., April 2, 1990, p. 25, col. 3.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

SIMON & SCHUSTER, INC.,
Petitioner,

v.

MEMBERS OF THE NEW YORK STATE
CRIME VICTIMS BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION, THE ALLIED EDUCATIONAL FOUNDATION, CITIZENS FOR LAW AND ORDER, THE MARYLAND COALITION AGAINST CRIME, THE NATIONAL VICTIM CENTER, PARENTS OF MURDERED CHILDREN, THE STEPHANIE ROPER FOUNDATION, AND 46 MEMBERS OF THE NEW YORK STATE LEGISLATURE IN SUPPORT OF RESPONDENTS

[THE NAMES OF THE STATE LEGISLATORS ARE LISTED ON THE INSIDE OF THE FRONT COVER]

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-1059

SIMON & SCHUSTER, INC.,
Petitioner,

v.

MEMBERS OF THE NEW YORK STATE
CRIME VICTIMS BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION, THE ALLIED EDUCATIONAL FOUNDATION, CITIZENS FOR LAW AND ORDER, THE MARYLAND COALITION AGAINST CRIME, THE NATIONAL VICTIM CENTER, PARENTS OF MURDERED CHILDREN, THE STEPHANIE ROPER FOUNDATION, AND 45 MEMBERS OF THE NEW YORK STATE LEGISLATURE IN SUPPORT OF RESPONDENTS

[THE NAMES OF THE STATE LEGISLATORS ARE LISTED ON THE INSIDE OF THE FRONT COVER]

INTERESTS OF *AMICI CURIAE*

The *amici* are individuals and organizations concerned with promoting victims' rights in the criminal justice system. A further description of the *amici* is set forth in the Appendix to this brief.

STATEMENT OF THE CASE

In 1977, the State of New York enacted Executive Law § 632-a, which authorized the New York State Crime Victims Board to establish escrow accounts into which those who contract with accused or convicted criminals regarding the reenactment of their crimes are required to pay all moneys owed on account of such contract.[1] The moneys deposited are to be paid to victims or legal representatives who obtain a money judgment for damages against the criminal (or legal representative) within five years of the date of the establishment of the escrow account. N.Y. Exec. Law § 632-a(1) (McKinney 1982). Funds may be drawn from the account (to a maximum of 20 percent) for the benefit of the person accused or convicted of a crime to help defray the expenses of legal representation or production of the book. *Id.* § 632-a(8). If unclaimed funds remain five years after the account is first established, payment of the remainder shall be made to the criminal or legal representative. *Id.* § 632-a(4).

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[1] Section 632-a affects every person or entity who contracts with a criminal with respect to the reenactment of the criminal's crimes. The medium of the reenactment may be a "movie, book, magazine article, tape recording, phonograph record, radio or television presentation, [or] live entertainment of any kind." It does not single out the press for special treatment, adverse or otherwise.

The legislative intent behind the law was succinctly stated by the law's chief sponsor, State Senator Emmanuel R. Gold:

> It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured -- while five people are dead and other people were injured as a result of his conduct. *This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.*

1977 New York State Legislative Annual 267 (memorandum of Sen. Gold) (emphasis added). Further evidence of the legislative purpose may be found in the Assembly's memorandum:

> Currently a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to the resulting publicity. *This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their suffering.* The requirement of a civil action will prevent the abuse of this privilege.

Assembly Bill Memorandum Re: A 9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws 823 (emphasis added).

The bill passed both houses of the state legislature and was signed into law by the Governor as Section 632-a of the Executive Law.[2]

There is nothing whatsoever in the legislative record that reveals or even suggests a calculated attempt on the part of the State of New York to limit the circulation of information, punish the press, or target expressive activity for special adverse treatment. The focus throughout was on the laudatory goal of preventing unjust criminal enrichment and assisting crime victims.

In the fourteen years since its enactment, Section 632-a has effectively prevented unjust enrichment and aided crime victims in the manner envisioned by the New York legislature. For example, the law successfully applied to bank robber John Wojtowicz, the role model for Al Pacino in the film "Dog Day Afternoon," so that Wojtowicz's film royalties, amounting to over $80,000, were distributed to three of his crime victims. *Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979). Similarly, in 1987, a New York Supreme Court Justice ruled that Section 632-a allowed eight people victimized by the law's eponym, "Son of Sam" killer David Berkowitz, to receive shares of the more than $118,000 due to Berkowitz for book and movie deals. N.Y. Times, Sept. 2, 1987, at B3, col. 4.

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[2] Petitioner makes much of the fact that it took little time for Section 632-a to be enacted into law (Petitioner's Brief at 5), as if the State legislature should be condemned for being "unduly" responsive to the law-abiding citizenry it was elected to serve. Because it took little time for Section 632-a to become law, Petitioner implies that the law was poorly written. Whatever force this non sequitur may have had in 1977 has long since dissipated because the legislature has continued to monitor the problem and has enacted subsequent substantive amendments to Section 632-a. (1978 N.Y. Laws, C. 417, § 1; 1981 N.Y. Laws, s. 445, §§ 2, 3).

At least forty states[3] and the United States Congress[4] have adopted laws similar to Section 632-a, which was the first of its kind in the nation. As was the case in New York, the motivating event behind many of these laws was a sensational crime within the jurisdiction whereby the criminal stood to profit from the experience. *See* Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353, 1355 (1988).

In this case, Henry Hill was a career criminal, formerly employed in New York by the Lucchese Mafia family. When he came to the attention of Petitioner Simon & Schuster, Hill was cooperating with state and federal prosecutors under the Federal Witness Protection Program. He agreed to collaborate with author Nicholas Pileggi on a book describing his activities as a low-level member of a criminal enterprise. The book, entitled *Wiseguy*, described in detail his participation in bribery, assault, extortion, theft, burglary, arson, drug dealing, credit card fraud, and murder. *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 779 (2d Cir. 1990). As the Second Circuit opinion concluded: "Needless to say, there were many, many victims of the crimes committed by Henry Hill, and a great number of those victims are identified in *Wiseguy*." *Id.*

On January 31, 1986, the Crime Victims Board advised Petitioner that the publication of *Wiseguy* fell within Section 632-a's coverage. Specifically, the Board

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[3] *See In the Matter of Children of Bedford, Inc. v. Petromelis*, ___ N.Y.2d ___ (New York Court of Appeals, May 7, 1991), slip opinion, at 16 n.3.

[4] 18 U.S.C. § 3681 (1988).

concluded that *Wiseguy* was subject to Section 632-a because it contained statements regarding Hill's admitted involvement in many violent and brutal crimes against the citizens of the State of New York. Therefore, the Board ordered Petitioner to pay all money it had paid or would be paying to Hill for his work on the book to an escrow account for the potential claims of his victims.

Petitioner brought this action challenging Section 632-a on First Amendment grounds and contending that Section 632-a directly burdened the exercise of First Amendment rights. The District Court rejected this contention and held that the law involved only incidental burdens on First Amendment freedoms and was justified by the state's interest in compensating victims. *Simon & Schuster v. New York State Crime Victims Board*, 724 F. Supp. 170, 178-79 (S.D.N.Y. 1989). On appeal, the Second Circuit affirmed, holding that although in its opinion the law imposed a direct burden on speech, the state interest in preventing criminals from profiting from their crimes while the victims of the crime remain uncompensated for their financial losses occasioned by the crime was a compelling interest. *Fischetti*, 916 F.2d at 782.

This Court granted the petition for certiorari on February 19, 1991. ___ U.S. ___, 111 S. Ct. 950 (1991).

SUMMARY OF ARGUMENT

Section 632-a is a regulation of nonexpressive conduct. It does not prohibit or otherwise regulate expression. It regulates the disposition of money that a publisher has agreed to pay as a result of a contract between the publisher and the criminal for publication of the criminal's account of his crimes.

The law does not affect the freedom of a willing speaker to engage in expressive conduct. If a criminal is less willing to speak because the prospect of payment has been tempered by the application of Section 632-a, it is on account of a regulation of conduct, not speech. Its effect, therefore, would be on the amount of money needed for a publisher to persuade the criminal to speak. As such, it affects conduct not speech. This Court's decision in *Meyer v. Grant*, 486 U.S. 414 (1988), is not a bar to any financial disincentive because *Meyer*'s holding relates to restrictions on the political process itself, which have traditionally triggered a higher level of scrutiny.

The law does not single out the press for adverse treatment of the type condemned by this Court in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). The financial burden, if any, is laid on the criminal, not the media. The publisher's only financial obligation is triggered by failure to comply with the law's garnishment provisions, not from the exercise of First Amendment freedoms. The law is not a content-based regulation of speech or expressive conduct and therefore does not come under the doctrine of *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). There are many instances where the law regulates nonexpressive conduct on the basis of what a person says.

Because Section 632-a is a regulation of nonexpressive conduct, it is properly subject to a rational basis analysis. The activity regulated -- the disposition of proceeds of the contract between a criminal and a publisher -- is nonexpressive conduct. There is no speech element involved in the regulation. If this Court decides, however, that there is a speech element which cannot be separated from the nonexpressive conduct regulated by the

law, then this Court should apply the standard set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The manner of payment under the contract is not protected activity. At most, the regulation of the payment is only an incidental burden on free speech. The effect, if any, would be to increase the amount of compensation offered by the publisher in order to persuade the criminal to speak.

Section 632-a meets the *O'Brien* standards. The state's interest in assuring that a criminal does not profit from his crime while the victims of the crime are in need of compensation is important and substantial, if not compelling. This interest is unrelated to the suppression of expression. The Second Circuit erred in this case when it held *O'Brien* inapplicable because it believed the law had a relation to expression. The incidental restriction on speech, if any, is no greater than is essential to the furtherance of the state's interest.

Even if this Court applies the strict scrutiny standard, Section 632-a is constitutional. The state's interest is compelling, and both the Second Circuit and the New York Court of Appeals have found that the means used are narrowly tailored to achieve this end without unnecessarily abridging freedom of speech. The criminal is free to speak; the publisher is free to publish and distribute the book. The payments to the criminal are in effect garnished until the victims are fully compensated. Earnings from writings about prison life in general or from subsequent employment as an "expert" are not attached. The reach of Section 632-a is limited to the new assets arising from criminal activity which has left victims uncompensated for their losses. As such, it is narrowly tailored to achieve New York's compelling interest in preventing the unjust enrichment of a criminal until the valid claims of the victims have been redressed.

ARGUMENT

I. The New York Statute Does Not Impose Any Direct Burden on the First Amendment Right of Free Speech.

The proper starting point for analyzing whether Section 632-a contravenes the First Amendment is to determine whether it abridges the exercise of free speech. Petitioner is unable to point to anything in the statute that directly prohibits either a criminal from telling the story of his crimes to a book publisher, or a book publisher from subsequently publishing an account of the story. Section 632-a operates to reduce the profit-making motive of criminals with respect to media reenactments of crimes. It does this by regulating *conduct*.

Section 632-a prevents the criminals from profiting from the reenactment of the crime while victims remain uncompensated as a result of the wrongdoing. Section 632-a does not prohibit expression; it merely removes the criminal's expectation of immediate and direct compensation for the reenactment of the crime through the media.

The issue in this case is therefore not whether the State of New York can enact a law forbidding publishers from publishing books written by convicted criminals. Nor is it whether New York has the power to restrict or censor speech it deems offensive. Rather, the issue is whether New York may control the disposition of money that a publisher has pledged to a criminal as the result of a contract between the publisher and the criminal for the publication of the criminal's account of his crimes. As such, nothing in Section 632-a infringes upon the exercise of freedoms protected by the First Amendment.

A. Section 632-a Does Not Affect the Freedom of a Willing Speaker To Engage in Expressive Conduct.

In this case, it is undisputed that Petitioner's book was actually written, published, and sold. Nevertheless, Petitioner contends that Section 632-a constitutes a direct burden upon the exercise of First Amendment rights. Specifically, it contends that the law has "led to decisions not to write and not to publish certain works, and to self-censor discussion of events which books otherwise would have included, to avoid triggering the law." Petitioner's Brief at 19. The "evidence" to support this claim, besides being speculative and self-serving, rests on an erroneous premise.

The argument that Section 632-a violates the First Amendment because it *might* deter the criminal from telling the story of his crimes assumes that a right to be compensated is protected by the First Amendment. Petitioner goes so far as to suggest that "the incentive of economic gain is the engine that drives free expression." Petitioner's Brief at 20. In other words, Section 632-a is said to make it more difficult for Petitioner to persuade criminals to speak about their crimes. But "[f]reedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). If a criminal is less willing to speak because the prospect of payment has been tempered by the application of Section 632-a, it is on account of a regulation of conduct, not speech. The fact that the law requires payments from the publishers to be applied first towards victim compensation does nothing in and of itself to preclude the exercise of speech. The effect, if any, would be to increase the amount of compensation offered by the publisher in order to persuade the criminal to speak.

Petitioner cites *Meyer*, 486 U.S. 414, as supporting the proposition that "payments necessary to make and disseminate speech can no more be restricted than the speech itself." Petitioner's Brief at 13. Petitioner's contention is not supported by a careful reading of this case. *Meyer* invalidated a Colorado statute which made it a felony to compensate circulators of initiative petitions. The Court observed that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 421-22. This is consistent with the heightened scrutiny reserved for review of "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

In contrast, Section 632-a does not restrict the political processes, either directly or indirectly. An attempt to control the proceeds of a contract between a criminal and a publisher does not in any way touch upon the political processes. Moreover, unlike the law invalidated in *Meyer*, Section 632-a does not prohibit the conduct, it simply regulates it. Thus, while Colorado banned the use of paid circulators, the criminal remains free to contract with a publisher and to tell his story.

The political context of *Meyer* is very important. The *Meyer* Court, like the Colorado Supreme Court, viewed the restrictions as "reducing the total quantum of speech on a public issue." *Id.*, 486 U.S. at 423. In the political context, this is a sound approach. *Carolene Products*, 304 U.S. at 152 n. 4. Petitioners, however, attempt to state this language as a general proposition, applicable to all speech. Petitioner's Brief at 17. As a general principle, invalidation of any regulation which

restricts the quantity of speech would be overly broad. It would obliterate the distinction between direct and indirect or incidental burdens (*O'Brien*, 391 U.S. at 376-77) and would undermine the time, place, and manner restrictions long recognized by this Court. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-06 (1986) (the argument that requiring the respondents to move their bookselling business to another location would have impermissibly burdened their First Amendment freedoms "proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities").

Similarly, Petitioner's reliance upon *Buckley v. Valeo*, 424 U.S. 1 (1976), is misplaced. As with *Meyer*, the meaning of *Buckley* should not be separated from its political context. The limitation on campaign expenditures was held to be a direct limitation on the quantity of political communication of a candidate or campaign. *Id.* at 18. This is a direct restriction on the political process itself. The Court analogized the restriction to "being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 19 n.18. While this is an apt observation on the impact of expenditure limitations on political communications, the analogy does not fit the instant case, as Petitioner contends. Petitioner's Brief at 21. There are no monetary limitations on how much the publisher may pay the criminal for his story. The requirements of Section 632-a deal with the manner of the payment to the criminal, not the extent of any payment. As such, Section 632-a is more closely analogous to the time, place, and manner restrictions distinguished by the *Buckley* Court. *Buckley*, 424 U.S. at 18.

Petitioner argues that removing the financial incentive for the criminal will necessarily impede the production of

speech. Petitioner's Brief at 18-21. A similar argument was rejected by this Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg*, the newspaper reporters argued that the First Amendment protected the confidentiality of their sources. Specifically, it was claimed that without the assurance of confidentiality, informants would refuse or be reluctant to furnish newsworthy information in the future. *Id.* at 682. This, of course, is very similar to the contention advanced by Petitioner in this case. The *Branzburg* Court viewed the evidence of the inhibiting effect as essentially speculative (*id.* at 693-94) but assumed for purposes of argument that some potential informants would not talk with reporters for fear of identification. *Id.* at 695. Nevertheless, such an impact on the news gathering capabilities of the media was not sufficient to override "the public interest in pursuing and prosecuting those crimes reported to the press by informants and thus deterring the commission of such crimes in the future." *Id.*

In responding to the argument that refusal to recognize a reporter's privilege under the First Amendment would undermine the freedom of the press, the *Branzburg* Court replied that the lessons of history taught otherwise. *Id.* at 698. This Court concluded, "The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press." *Id.* at 69. In other words, experience and common sense can sometimes serve as a better guide to the future than reliance on self-serving affidavits. The experience under Section 632-a is similarly instructive. For nearly ten years after enactment of Section 632-a, no book publisher mounted any broad-based legal challenge

to the law's alleged "chilling effect" on its press rights.[5] Nor was there any noticeable decline in the number of criminal books being written and published. It is clear that the rights of the publisher and the willing speaker remain unaffected by Section 632-a.

B. Section 632-a Neither Singles Out the Press Nor Sanctions a Content-Based Regulation of Speech.

By its terms, Section 632-a is applicable to "[e]very person, firm, corporation, partnership, association or other legal entity contracting with any person . . . accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine, article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind. . . ." N.Y. Exec. Law § 632-a(1) (McKinney 1982). Petitioner argues that the law has thereby singled out the press for adverse treatment, relying principally upon *Minneapolis Star*, 460 U.S. 575, and *Arkansas Writers' Project*, 481 U.S. 221. Petitioner's Brief at 21.

Minneapolis Star and *Arkansas Writers' Project* stand for the proposition that a discriminatory tax imposed on the press places such a burden on the interests protected by the First Amendment that the state must demonstrate the tax serves a compelling governmental interest which cannot be achieved without differential taxation. Apart from the question of whether these cases are intended to be applied beyond the area of taxation, it is clear that

[5] In this regard, *amici* are at something of a loss to understand why a law characterized by Petitioner as "intolerable" and "presumptively violative of the First Amendment" (Petitioner's Brief at 14) was not challenged shortly after enactment. The apparent answer is that these characterizations are simply hyperbole.

Section 632-a is not intended to subject the press, or the media generally, to adverse treatment. The press is not required to shoulder any greater financial burden than an employer served with a writ of garnishment. Unlike the taxes invalidated in *Minneapolis Star* and *Arkansas Writers' Project*, the payments are not intended to come out of the financial resources of the press but rather from the proceeds of the contract with the criminal. Only if the entity which has contracted with the criminal chooses to ignore the statute can there be any adverse financial impact. This is no different, however, than the exposure of an employer who pays wages to an employee after being served with a writ of garnishment. *See, e.g.*, N.Y. Civ. Prac. L & R § 5231(f) (McKinney Supp. 1991); Calif. Civ. Proc. Code § 706.154(a) (West 1987); S.D. Codified Laws Ann. § 21-18-12 (Michie 1987). The employer in such a situation is not taxed or penalized on account of the employee's activities but rather on account of its own failure to comply with the law. In this case, Petitioner's obligation to pay a sum from its financial resources arises not due to the exercise of First Amendment freedoms, but due to its failure to comply with the law.[6] By contrast, the taxes imposed in *Minneapolis Star* and *Arkansas Writers' Project* were a result of their publishing activities. In sum, Section 632-a does not single out the press for the imposition of any financial burden because of the exercise of its First Amendment freedoms.

Petitioner also contends that the regulation imposed by Section 632-a is content-based and therefore subject to strict scrutiny. Petitioner's Brief at 22. The doctrine

[6] There can be no argument in this case that Petitioner lacked sufficient notice of the applicability of Section 632-a. Indeed, Petitioner abandoned its due process argument on appeal to the Second Circuit. *See Fischetti*, 916 F.2d at 781.

referred to by Petitioner has been articulated in *Mosley*, 408 U.S. at 96:

> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

The doctrine regarding content-based regulation extends to expressive conduct as well. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 412 (1989). The reach of this doctrine is clearly defined: government may not regulate speech or expressive conduct on the basis of the content of the speech or expressive conduct.

In this case, Section 632-a does not regulate speech or expressive conduct, it regulates the contract between the criminal and the publisher. *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 724 F. Supp. 170, 177 (S.D.N.Y. 1989) ("[t]he speech itself is not the target of section 632-a; the profit-making aspect is the target"). There is nothing in the content-based regulation cases which extends the doctrine to include regulation of nonexpressive conduct. *See, e.g., Johnson*, 491 U.S. 397 (prohibition of flag desecration by burning is a content-based regulation of expressive conduct); *Boos v. Barry*, 485 U.S. 312 (1987) (ban on signs within 500 feet of foreign embassy if the sign expressed views against the foreign government is a content-based regulation of speech); *Arkansas Writers' Project*, 481 U.S. 221 (taxation or exemption of magazine publications on the basis of content is a regulation of speech); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (prohibition of editorializing by noncommercial educational broadcasting

tation is a content-based regulation of speech); *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980) (regulation of utility bill inserts is a content-based regulation of speech); *Carey v. Brown*, 447 U.S. 455 (1980) (prohibition of picketing except for labor disputes is a content-based regulation of speech and expressive conduct); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (prohibition of films containing nudity by a drive-in theater is a content-based regulation of speech); *Mosley*, 408 U.S. at 96 (prohibition of picketing within 150 feet of school building except for labor picketing is a content-based regulation of speech and expressive conduct).

It is appropriate, and at times necessary, for government to regulate nonexpressive conduct with content-based criteria. The law of antitrust, for example, prohibits agreements among competitors to allocate markets or to fix prices. *See, e.g., Palmer v. BRG of Georgia, Inc.*, ___ U.S. ___, 111 S. Ct. 401 (1990); *Goldfarb v. Virginia State Bar*, 421 U.S. 733 (1975) (county bar's *publication* of fee schedule was part of an unlawful price-fixing scheme). Federal securities law regulates false or misleading statements made in connection with the sale of securities. *See, e.g., SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969). Federal bankruptcy law denies a discharge of indebtedness for a debtor who knowingly makes a false oath in connection with the case. 11 U.S.C. § 727(a)(4) (1988). Rule 11 of the Federal Rules of Civil Procedure authorizes a court to impose sanctions against a party or counsel if the pleading, motion, or other paper is not well grounded in fact, law, or equity. *See, e.g., Business Guides v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___, 111 S. Ct. 922 (1991). These are just a few of countless instances where the law regulates nonexpressive conduct based on its content. Section 632-a is

yet another example -- the telling of the story of the crime or criminal activity triggers the state's regulation, not of the publication, but of the disposition of proceeds from the contract between the criminal and the publisher.

II. Because Section 632-a Is a Regulation of Nonexpressive Conduct, It Is Properly Subject to a Rational Basis Analysis.

With respect to the appropriate level of scrutiny to be applied to Section 632-a, Petitioner has argued for strict scrutiny and has attempted to distinguished the lower level of scrutiny set forth in *O'Brien*, 391 U.S. 367. *Amici* submit that neither strict scrutiny nor *O'Brien* scrutiny is appropriate in this case; rather, Section 632-a should be analyzed under a "rational basis" approach. When, as here, a law only regulates nonexpressive conduct and does not indirectly burden speech, rational basis is the appropriate standard. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). That rule of law is implicit in *O'Brien* because it dealt with "speech" and "nonspeech" elements combined in the same course of conduct. *Id.* at 376. *O'Brien*'s standard is inapplicable unless there is at least some element of speech in the conduct to be regulated. It follows, *a fortiori*, that the strict scrutiny standard requires an even greater element of speech in the regulated conduct. *See, e.g., Johnson*, 491 U.S. 397.

In the present case, the activity regulated is nonexpressive conduct; it has *no* speech element. Section 632-a does not prohibit or regulate in any way the actual writing, publication, or sale of the reenactment of a criminal's crime. It regulates the disposition of the proceeds of the contract between the criminal and the publisher. Both the criminal and the publisher are free, as they were in this case, to collaborate and publish the story. The Board may not prohibit or in any way impose

conditions on the distribution and sale of the book if the publisher does not comply with Section 632-a. The law regulates nonexpressive conduct alone.

Under the rational basis approach, it is clear that Section 632-a is rationally related to a legitimate state interest. Petitioner concedes that the interest of the state in providing compensation for crime victims is a legitimate one. Petitioner's Brief at 28. The state's interest in preventing a criminal from profiting from a crime while the victim of the crime remains uncompensated is certainly no less a legitimate interest. *See, e.g., Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989) ("[t]he Government's interest in winning undiminished forfeiture thus includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it"); *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889) ("[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime").

Section 632-a is unquestionably a rational manner of realizing the state's legitimate interest. The only assets reached by the statute are the proceeds from the product -- a story -- created by the criminal's illegal activities. *See Children of Bedford*, slip opinion at 19. The funds are to be paid to those victims who establish valid claims against the criminal in a court of competent jurisdiction. Accordingly, Section 632-a is a rational approach to the advancement of the state's legitimate interests, and the statute should therefore be upheld.

III. Any Effect of Section 632-a on Free Speech Is at Most Incidental, and Thus the Statute Should Be Subject to No Higher Standard of Scrutiny Than the *O'Brien* Standard.

If the criminal's reenactment of the story of the crime and the contract between the criminal and the publisher are considered to be indivisible and thus are treated as a unit of conduct, then it is necessary to determine the extent to which such conduct is protected by the First Amendment. The telling of the story is clearly protected activity, and thus the issue becomes: (1) whether the manner of payment under the contract is protected activity, and (2) if not, whether regulation of the manner of payment involves a direct burden on the protected element of the activity -- the telling of the story. If the manner of payment is not protected activity and if its regulation presents at most an incidental burden on the exercise of free speech, the appropriate level of scrutiny will be found under the *O'Brien* case.

A. The Manner of Payment Under the Contract Is Not Protected by the First Amendment.

Section 632-a regulates the receipt of payment by the criminal under the contract with the publisher. It neither prohibits compensation nor regulates the amount of compensation agreed between the parties. The law simply requires that payment be made to an escrow fund for distribution to victims who may become judgment creditors within the requisite time period. Section 632-a in effect regulates the time, place, and manner of the payments under the contract.[7]

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[7] Compensation to the criminal is merely delayed, not foreclosed. Section 632-a allows any remaining funds held in escrow not claimed (continued...)

Payments made to the criminal for the right to publish the reenactment of the crime or the criminal's "thoughts, feelings, opinions or emotions regarding such crime" are in reality proceeds of the criminal activity. In committing crime, the criminal may "create, by illegal activity, a new product -- a story -- which becomes profitable in the retelling." *Children of Bedford*, slip opinion at 19. It is the crime itself which creates the story,[8] and it is the telling of the story by the criminal which generates the profits. The crime may serve to create a right of publicity which the law under other circumstances recognizes as a protected property right. *Cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

Because payments made to a criminal for the media rights to the story of the crime are essentially proceeds of the crime itself, the action taken by New York in this case is indistinguishable from the forfeiture upheld in *Caplin*, 491 U.S. 617. In *Caplin*, this Court rejected Fifth

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[7] (...continued)
by victims to be turned over to the criminal at the expiration of five years from the date the escrow account is established. N.Y. Exec. Law § 632-a(4) (McKinney 1982).

[8] Of course, not all crime creates a story of interest to the general public. First Amendment attorney Martin Garbus, who represents several New York-based publishers, expressed the irony of the situation with this observation:

> You have to balance two factors: people like Berkowitz making a bundle of money and free press. I think free press is the more important issue. On the other hand, criminals can say the grosser the crime, the more money is in it for me, so instead of killing one person, I'll kill seven.

Washington Post, Aug. 18, 1987, at A5, col. 1.

and Sixth Amendment challenges to the forfeiture provisions of the criminal enterprise statutes, holding that a criminal cannot retain proceeds of the crime in order to exercise constitutional rights. *Id.* at 632-33. Likewise, payments received by the criminal for media rights to the crime should be regarded as proceeds of criminal activity and therefore unprotected by the First Amendment.

No attempt is made under Section 632-a to prevent the criminal from writing about or providing the media with an account of the crime. In fact, Section 632-a allows a portion of the payments to be received under the contract to be used for the necessary expenses incurred in telling the story. N.Y. Exec. Law § 632-a(8) (McKinney 1982). No attempt is made to prevent the publisher from publishing, distributing, or selling the story. The sole activity regulated by Section 632-a is the manner of payment to the criminal under the contract. This activity cannot be regarded as protected by the First Amendment.

B. Section 632-a Presents at Most an Incidental Burden on the Exercise of Free Speech.

If the manner of payment is not protected by the First Amendment, then the question is whether the state's regulation of the unprotected activity directly burdens the exercise of protected freedoms. As noted earlier, "Freedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). Petitioner's contention that it must persuade the criminal with offers of immediate financial compensation may lead one to question the sincerity of the supposed "willing" criminal author. In any event, this Court has held that a similar disincentive on informants constituted at most only an incidental burden on the gathering of news information

by reporters. *Branzburg*, 408 U.S. at 693-95. Section 632-a does not prohibit or limit the amount of money to be paid under the contract. The parties may take into account the estimated damages owing to the criminal's victims when agreeing on an amount of compensation. Section 632-a may have the effect of increasing the publisher's offer in order to persuade the criminal to speak. As such, it has only an incidental effect on the exercise of First Amendment rights.

The "inevitable effect" of Section 632-a is *not* the suppression of speech. *See O'Brien*, 391 U.S. at 384. The inevitable effect of the law is that victims of the criminal's wrongdoing will be given an opportunity to receive compensation from the proceeds of the media account of the crime. Because Section 632-a involves, at most, only incidental effects on the exercise of protected activities, the *O'Brien* standard should be used in the event the rational basis standard is found inapplicable.

IV. Section 632-a Passes Muster Under the *O'Brien* Standard.

"[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. The *O'Brien* standard is as follows:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater

than is essential to the furtherance of that interest.

Id. at 377.

The District Court in this case held that "the New York state legislature acted within its authority in enacting [Section 632-a]." *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 724 F. Supp. 170, 178 (S.D.N.Y. 1989). Petitioner does not contest this conclusion. The remainder of the *O'Brien* criteria are considered separately.

A. The State's Interest is Important and Substantial.

New York's interest in enacting Section 632-a exceeds the *O'Brien* standard because the interest is not only important and substantial, but also compelling:

> It cannot be gainsaid that the state has a very strong interest in preventing criminals from profiting from their crimes. [Citations omitted]. But the state has a much stronger, indeed a compelling, interest in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization. . . . Our society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime.

Fischetti, 916 F.2d at 782. *See also Children of Bedford*, slip opinion at 13.

B. The State's Interest Is Unrelated to the Suppression of Expression.

As the Second Circuit observed of Section 632-a, "The purpose of the statute, of course, is not to suppress speech but to assure that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited." *Fischetti*, 916 F.2d at 783. The legislative history, as well as the statutory language itself, is devoid of any indication that the statute was enacted in order to suppress the criminal's right to tell the story of the crime. The law is viewpoint neutral. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986). In fact, the law even encourages publication by making a portion of the funds available for production costs. Section 632-a therefore cannot be characterized as relating to the suppression of expression.

Even though the interest of New York is clearly unrelated to the suppression of expression, the Second Circuit in this case rejected the apparent contention that the governmental interest bore "no relation to expression" and held that *O'Brien* was therefore inapplicable. *Fischetti*, 916 F.2d at 781. However, this Court has never required under the *O'Brien* approach that a regulation be completely divorced from any impact on speech. *O'Brien* expressly deals with the combination of speech and nonspeech elements. *O'Brien*, 391 U.S. at 376. If there are no speech elements implicated, then the rational basis approach would apply. *See* Section II, *supra*. The Second Circuit thus misspoke when it articulated the standard as "no relation to expression" rather than *O'Brien*'s "unrelated to the *suppression* of *free* expression." *Id.* (emphasis added). *See Johnson*, 491 U.S. at 410 (flag-burning statute related to the "suppression of free

expression" and thus is "outside of *O'Brien*'s test altogether"). In this case, Section 632-a's impact or nexus with speech, if it exists, is compatible with application of the *O'Brien* standard, because it is the criminal's own nonprotected conduct (the criminal activity leaving victims in need of compensation) which gives rise to the necessity of the regulation. *See City of Renton*, 475 U.S. at 48 (1986). The state's interest is therefore entirely unrelated to the suppression of free expression.

C. The Incidental Restriction on Alleged First Amendment Freedoms, If Any, Is No Greater Than Is Essential to the Furtherance of that Interest.

The District Court in its application of the *O'Brien* standard found that the line drawn by Section 632-a did not operate to prohibit expressive activity, but effectively garnished the proceeds from the contract with the publisher. *N.Y. State Crime Victims Board*, 724 F. Supp. at 179. Section 632-a does not attempt to attach proceeds from others, such as Nicholas Pileggi, who write about crime. It is limited to moneys generated by the reenactment of the crime and does not attach to the criminal's other assets. It does not apply to victimless crimes. *In re Halmi*, 12 Media L. Rptr. 2388 (Sup. Ct. N.Y. County), *aff'd*, 512 N.Y.S.2d 650 (1987); *In the Matter of Bernhard Hugo Goetz*, slip opinion at 7-8 (N.Y. State Crime Victims Board, May 17, 1988). Section 632-a delays, but does not foreclose, payment to the criminal. There is limited access to the funds for legal representation or the necessary expenses of production. Moneys remaining in the account after five years are paid to the criminal. For basically the same reasons that both the Second Circuit and the New York Court of Appeals found that § 632-a satisfied the strict scrutiny standard, the incidental restrictions on speech, if any, are no greater

than is essential to the furtherance of the state's interest. *Fischetti*, 916 F.2d at 783-84; *Children of Bedford*, slip opinion at 17-20.

V. Even If This Court Applies Strict Scrutiny, Section 632-a Is Constitutional.

If strict scrutiny is the applicable constitutional standard against which Section 632-a must be measured, the state must show both that the statute furthers a compelling governmental interest and that the means employed are "closely drawn to avoid unnecessary abridgment." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (quoting *Buckley v. Valeo*, 424 U.S. at 25). The two courts that have subjected Section 632-a to strict scrutiny analysis have both concluded that it meets these standards. *Fischetti*, 916 F.2d at 782-84; *Children of Bedford*, slip opinion at 13-20.

As discussed before, New York's interest is in ensuring that a criminal does not profit from his crime while his victims remain uncompensated for their losses occasioned by the wrongdoing. Both courts found this interest to be a compelling governmental interest. *Fischetti*, 916 F.2d at 782; *Children of Bedford*, slip opinion at 13-16. Petitioner apparently does not contest this assessment of the nature of the interest. Petitioner's argument is devoted to the question of whether the means are narrowly tailored to serve this interest.

The appropriateness of the means used to achieve the governmental interest has been analyzed briefly in connection with the *O'Brien* standard. *See* Section IV.C, *supra*. In addition, the Second Circuit's opinion addressed the "fit" between the interest and the means used:

> The statute recognizes that the only way a criminal can profit directly from a specific crime involving a particular victim, other than by obtaining any proceeds of the crime itself, is by writing or talking about or reenacting it. The statute also recognizes that, as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes. The first amendment right to speak is restricted only as a consequence of their inability to profit until the victim is compensated. Section 632-a is designed to tie up the proceeds until victims have had an opportunity to make their claims for compensation. It provides a specialized form of attachment and is designed to freeze the proceeds of storytelling by criminals for the benefit of those whose misfortunes gave rise to the story.

Fischetti, 916 F.2d at 783. Petitioner argues that the Court of Appeals' analysis is a circular approach which renders strict scrutiny analysis essentially toothless. Petitioner's Brief at 42. Petitioner's argument is without merit. When drafting statutes which touch upon the exercise of constitutional rights, the legislature is acting in the interest of the State of New York. This is precisely the requirement which needs to be, and is, met.

The New York Court of Appeals likewise found that the means were narrowly tailored to achieve the statute's purpose:

> A criminal may earn income from writings on such subjects as prison life in general, as Harris has (*see Harris v. Abate* [Sup. Ct. N.Y. Co.], NYLJ 4/2/90, at 25, col. 3), or may subsequently obtain profitable employment as an "expert," as petitioners' hypothetical computer expert. That

> financial success is the result of their newly advertised expertise or prominence, not their illegal act. By contrast, criminals covered by the statute had no marketable asset before the crime: they create, by illegal activity, a new product -- a story -- which becomes profitable in the retelling.

Children of Bedford, slip opinion at 18-19.[9]

The reach of Section 632-a is limited to the new asset arising from criminal activity which has left victims uncompensated for their losses. As such, the statute is narrowly tailored to achieve New York's compelling interest in preventing the unjust enrichment of a criminal until the valid claims of the victims have been redressed.

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[9] *See also Fischetti*, 916 F.2d at 784:

> The general expertise derived by a thief from a series of thefts is not the same as the tale of a specific theft committed against an identifiable victim. Payment for expertise, royalties from books that do not describe crime victims, and other income and assets of criminals may be reached in other ways. Section 632-a deals with readily identifiable, locatable funds that are most commonly available to those who victimize others.

CONCLUSION

For the reasons stated herein, the Court should reject the contention that Section 632-a is unconstitutional, and the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

INTERESTS OF *AMICI*

The Washington Legal Foundation (WLF) is a national public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting victims' rights. WLF works with other victims' rights groups, including some of the *amici* in this case. WLF has appeared before this Court as *amicus curiae* in a number of cases dealing with victims' rights issues, including the recent case of *Payne v. Tennessee*, No. 90-5721.

The Allied Educational Foundation (AEF) is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions.

Citizens for Law and Order (CLO) is a grass-roots organization in the state of California devoted to supporting law enforcement agencies in that state in their efforts against crime. CLO supports measures in the California legislature designed to strengthen the criminal justice system. CLO was founded in 1970.

The Maryland Coalition Against Crime (MCAC) is based in Baltimore, Maryland. MCAC works for enactment of legislation that promotes tougher law enforcement measures and the rights of crime victims.

The National Victim Center is a national, non-profit organization based in Fort Worth, Texas. The Center's purposes are to promote responsiveness of the criminal justice system to the rights and needs of the victims of violent crime, as well as to increase public awareness concerning the plight of crime victims through educational programs, conferences, and publications.

Parents of Murdered Children (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national, non-profit, self-help support group organization based in Cincinnati, Ohio with chapters nationwide. Besides providing support for grieving parents and family members, POMC supplies information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family. POMC has appeared as an *amicus* in several cases.

The Stephanie Roper Foundation, Inc. (the Foundation) is a private, non-profit, volunteer-based organization in Maryland. The Foundation and its sister organization (The Stephanie Roper Committee, Inc.) provide free assistance to crime victims including information, legal help, and support groups. The Foundation is named for the victim of a brutal rape and murder, whose family members were treated unfairly and denied any rights of participation in the trial proceedings. Consequently, the Foundation and its sister organization were created to improve the plight of victims of crime. Maryland's version of the "Son of Sam" law was one of 22 major legislative enactments proposed by the Committee and enacted into Maryland law. The Foundation believes the current case provides an opportunity to reaffirm that criminals should not benefit from their illegal acts, and that victims should have the ability to be adequately compensated for their injuries.

In addition, forty-five members of the New York State legislature have joined in this brief as *amici*. Their names are listed on the back of the front cover of this brief. L. Paul Kehoe is the Chairman of the New York State Senate Committee on Crime and Correction. James P. King is the Co-Chairman of the New York State Assembly Republican Task Force on Crime Victims' Rights. Clarence D. Rappleyea, Jr. is the Minority Leader of the New York State Assembly. Robert C. Wertz is the Assistant Minority Leader of the New York State Assembly. George H. Winner, Jr. is the Minority Leader *Pro Tempore* of the New York State Assembly.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

v.

MEMBERS OF THE NEW YORK STATE
CRIME VICTIMS BOARD, ET AL.,

Respondents,

On Writ of CERTIORARI to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, SECURITY ON CAMPUS, INC., THE NATIONAL ORGANIZATION OF CRIME VICTIM COMPENSATION BOARDS, AND WHITE COLLAR CRIME 101 IN SUPPORT OF RESPONDANT

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The National Organization for Victim Assistance, founded in 1975 and based in Washington, D.C., is a national nonprofit membership organization dedicated to improving the rights and services for victims of crime through national advocacy, victim counseling, professional education, and membership support.

Security on Campus, Inc., is a national nonprofit corporation, organized under the laws of Pennsylvania, whose purpose is to enhance security from violence on colleges and universities nationwide, and to give a voice to student victims of such violence.

The National Association of Crime Victim Compensation Boards, a nonprofit organization founded in 1977, consists of the agencies handling victim compensation funds in 47 states—soon to be 49—plus the District of Columbia, and the Virgin Islands. It works to develop better methods for the administration of victim compensation statutes, and promotes the interchange of ideas and experience among the compensation programs.

White-Collar Crime 101, based in Vienna, Virginia, promotes public education and awareness regarding the prevention of white-collar crime, and provides resource material and referral service for victims of economic crime.

Amici[1] are organizations that work on behalf of victims of crime. They believe that protection and enhancement of the rights of victims of crime need to be a major goal of the criminal and civil justice systems. One of these rights is the recovery of financial losses that crime imposes on victims.

Amici ask that the decision of the Second Circuit be affirmed because the New York Son of Sam law—or "Notoriety-for-Profit" law, as the amici prefer to characterize it—and

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[1]Letters of consent to the filing of this brief have been received from petitioner and respondent, and are being filed with the Clerk of the Court pursuant to Rule 37.3.

similar statutes in other states, are an essential part of a societal interest in compensating victims for the losses they suffer from crime; and because these laws target the responsible party, the perpetrator, to pay for these losses.

Argument

Crime takes a major toll on society, but the burden is not evenly borne. It is the victims of crime and their families who suffer the direct physical harm, emotional trauma, and financial losses. Without reparations for their losses, the agony of victims is prolonged, often permanently. It has long been accepted in the law that where the criminal has assets by which to reimburse the victim, he or she should be ordered to do so. More importantly, where those assets are obtained by exploiting the crime itself, any efforts to thwart reparations are intolerable.

A. A Variety of Programs, Including the Notoriety-for Profit Laws, Is Needed to Provide Reparations for Victims Because None, by Itself, Sufficiently Compensates All Victims

Judicial and legislative developments throughout the Twentieth Century have enhanced the rights of those accused of crime. Only recently have legislatures and courts begun major steps to protect victims of crime. The subject of victims' rights was not recognized in jurisprudence, or in law school curricula, or in most American courtrooms until after 1975, when the National Organization for Victim Assistance was founded.

In the recent past, legislative attention has focused on how to make financial reparations to victims. The achievement of economic recovery for victims has been an elusive goal; the experience of the past two decades indicates that no system, standing alone, reaches all victims. Therefore, *all* approaches are needed to meet the societal goal of reparations for victims.

1. Victim Compensation Programs

Victim compensation by the state is hardly a new idea—

the Code of Hammurabi in 2038 B.C. required a city to compensate anyone victimized by crime within its gates. The idea was rediscovered 4000 years later when New Zealand adopted victim compensation in 1963, followed by California in 1965. Gradually, one state after another adopted laws creating victim compensation programs, which now exist in 47 states, the District of Columbia, and the Virgin Islands. Mississippi's program will begin July 1, 1991, and South Dakota's on July 1, 1992, leaving only Maine as a state without a statutory victim compensation system.

Victim compensation programs are the linchpin of reparations for the worst casualties of crime, providing financial assistance to tens of thousands of injured victims, or their survivors, each year. The programs pay for medical bills, lost wages, funeral expenses, and other out-of-pocket losses not reimbursed through other means, such as insurance or recovery from criminals or liable third parties.

The financial burden on victim compensation boards is enormous, sometimes to the breaking point. Indeed, Nebraska was forced to discontinue its program for a year during a recent economic downturn. To the extent that Notoriety-for-Profit laws reduce the financial pressure on these boards, they help all victims of violent crime—not just the victims of criminals who become successful co-authors.

Victim compensation boards, while helpful to countless victims in the 1980's, simply cannot be looked to as the sole solution to making victims whole:

(1) Forty-seven of the 49 jurisdictions have caps on recovery, 15 of them at $10,000 or less. In light of today's health care costs, victims' needs could far exceed that figure.

(2) The statutes cover violent crimes only. Victims of property crimes, from burglary to white-collar frauds, are not eligible.

(3) With very limited exceptions, the statutes do not permit payment for property losses associated with a violent crime.

(4) Forty-five of the 49 jurisdictions allow no recovery for pain and suffering and other general damages. Child victims, for example, could be reimbursed for counseling, but the programs are unable to address all of the long-lasting effects. See, for example, United States Department of Justice, National Institute of Justice, *When the Victim Is a Child* (1985).

The inconsistencies inherent in these programs, which have such limited resources to deal with such a massive societal problem, are analyzed in Smith, "Victim Compensation: Hard Questions and Suggested Remedies," 17 Rutgers L.J. 51 (1985).

Even if victim compensation covered all the losses of all the casualties of criminal violence, it would still be far fewer than 10 percent of all victims who would be compensated.

2. Restitution

Restitution has witnessed a substantial increase in usage by federal and state courts in recent years. Like victim compensation, court-ordered restitution has provided some recovery to many victims. But restitution, too, has met with only limited success, according to the four leading studies on its use:

(1) Kilpatrick, et al., *Victims Rights and Services in South Carolina: The Dream, the Law, the Reality, Final Report* (Crime Victims Research and Treatment Center, University of South Carolina, Mar. 31, 1989) (hereafter "the South Carolina study);

(2) Smith, Davis, and Hillenbrand, "Improving Enforcement of Court-Ordered Restitution," a study of the American Bar Association, Criminal Justice Section, Victim Witness Project (Aug. 1989) (hereafter "the ABA study");

(3) Poklemba and Abate, "Restitution in New York State: Recommendations for Improvement, A Joint Report to the Governor and the Legislature" (June, 1988) (hereafter "the New York study"); and

(4) California Council on Criminal Justice, "State Task Force on Victims' Rights" (Apr. 1988) (hereinafter "the California study").

The South Carolina study, the most complete to date,

lauds the legislature for its statute aimed at a creating a comprehensive effort to require restitution from criminals to victims. Even within such a legislative framework, the results were disappointing. Only 22 percent of case files with guilty pleas or verdicts contained restitution orders, and *only 10 percent of crime victims in cases with guilty defendants received any restitution*.

The other studies presented similar results. The ABA study, which looked at programs in Alabama, Minnesota, and Utah, pointed to the massive numbers of defendants without assets, and suggested that restitution be based on the ability of criminals to pay. The California study pointed to the inconsistent results across the state, while the New York study said defendants often had the ability to pay something but were not required to. The New York study, like the ABA study, noted that restitution, even when successfully implemented, would normally bring only small sums of money to the victim.

Even if full restitution were uniformly ordered and those subject to such orders were wiling and able to fulfill the orders, fewer than ten percent of all victims—the minority whose offenders were brought to justice—would be restituted. And some of their payments would reimburse the state's compensation program—that is, there is an overlap between the small minority which might be restituted and that which might be compensated by the state.

All in all, the assertion by petitioner that restitution is a meaningful substitute for a Notoriety-for-Profit law is belied by the four studies. The offender who earns a long prison sentence gains little except, perhaps, the avoidance of having to pay his debt to his victims as well as society, But thereafter publishing and producing films often can bring huge sums of money for the convict, as the book *Wiseguys* and film "Goodfellas," doubtless has done.

It is absurd, then, to equate the restitution remedy with the Notoriety-for-Profit remedy—only the latter has any realistic prospects of bringing sufficient financial remuneration to the

victims of Henry Hill, the mobster who is the subject of the books in question. Of course, in the unlikely event that Mr. Hill had previously made some amount of restitution to his victims, these sums would be deducted from any civil judgment arising out of the Notoriety-for-Profit law; the two legal devices operate as complementary methods to achieve redress, not mutually-exclusive options.

3. Civil Litigation

Civil litigation can proceed in two ways—against the defendants or against liable third parties. Examples of the latter could be shopping malls which provide inadequate security in their parking lots, or taverns that serve intoxicated persons who then return to their cars and commit a drunk-driving offense.

A tremendous growth has occurred in successful litigation against both criminal defendants and liable third parties; see, generally, Carrington and Rapp, *Victims Rights, Law and Litigation* (Matthew Bender, 1989).

But civil litigation depends on the criminal having been identified and (usually) convicted, and a deep pocket or there being a liable third party. In most crimes, neither is the case; again, it is worth noting that fewer than ten percent of *reported* crimes result in an authoritative identification of the offender—while a majority of crimes are not reported to the authorities (which remains a crude but telling index of how much faith Americans place in their institutions of justice).

4. Other Programs to Help Victims

The past decade has witnessed explosive gains in victim services. All United States Attorneys' Offices have a victim/witness coordinator, as do many state district attorneys—some at a ratio of one victim advocate for every three felony prosecutors.

Services aimed at helping particular types of victims, such as children, domestic violence victims, sexual assault victims, and the survivors of the victims of homicide, have been

created in most of American communities. Victim support groups have been created to help victims with their emotional and legal needs, groups such as those affiliated with the amici and with, as examples, Incest Survivors Resource Network International (Hicksville, New York), Mothers Against Drunk Driving (Arlington, Texas), National Assault Prevention Center (Columbus, Ohio), National Center for Missing and Exploited Children (Arlington, Virginia), National Coalition Against Domestic Violence (Washington, D.C.), National Coalition Against Sexual Assault (Washington, D.C.), National Institute Against Prejudice and Violence (Baltimore, Maryland), Parents of Murdered Children (Cincinnati, Ohio), and Spiritual Dimension in Victim Services (Sacramento, California).[2]

These organizations and the local programs they represent are all helpful to victims, but they do not, and cannot, deal with the financial losses that victims suffer from crime.

Only real money can do that, money from taxpayers, third parties, or law violators. It is the soundest public policy to look first to the law violator for the money, which is precisely what the Notoriety-for-Profit law does.

B. The Notoriety-for-Profit Law Is an Essential Part of a

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[2]It is a myth that victims invariably want to see the harshest possible treatment of law violators. Last year, an execution was commuted in Georgia at the request of the victim's family. "A Day Short of Death, a Georgia Killer Is Given Life," New York Times, Aug. 22, 1990, p.1. An Alabama study indicates that if intermediate alternatives were available between prison and no punishment (e.g., boot camp, house arrest, strict probation), the public quite often would support the middle ground over prison. Doble and Klein, *Punishing Criminals, The Public's View, An Alabama Survey* (Edna McConnell Clark Foundation, 1989).

Legislative Intent and Public Policy Favoring Reparations for Victims

When enacted, the Notoriety-for-Profit laws received universal support. An American Civil Liberties Union Handbook, *The Rights of Crime Victims*, by Stark and Goldstein (1985), devoted an entire chapter to these laws, indicating their importance to victims, and warmly praising such statutes:

> "While such payments are made to very few criminals and Son of Sam laws will not assist the vast majority of victims in recovering damages, the very notoriety of the crimes that do attract such large payments make Son of Sam laws important symbols to some people that criminals will not be permitted to profit from their crimes." (at p. 267)

The ACLU Handbook also addressed the issue of the constitutionality of the statute, concluding that the laws "probably [do] not" violate the First Amendment (p. 276). The authors note that "as a practical matter, such statutes have not deterred either criminals or publishers from publishing such stories." (Id.)[3]

Obviously, no deterrent to publish occurred with the mobster life of Henry Hill. Petitioner has undoubtedly made substantial sums on this work, and it is at least possible that there will be money left in the till for Mr. Hill after his victims are finally paid. Whether the publishing community, and criminals with a writing talent or a ghostwriter provided by the publisher, could make even more money without such a law is not relevant.

What is relevant is that the chilling effect, even if it can be identified in theory, does not exist in practice. This book and many others have been published with a Notoriety-for-Profit law

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[3]To the extent that the Handbook represents official ACLU policy, the ACLU did not indicate in its amicus brief why it now takes a different position.

in place for years.

The Notoriety-for-Profit law fills one gap in a skein of reparations provisions that does not otherwise exist. First, to the victims, it is of great procedural advantage. The statute of limitations for intentional torts is one or two years in most jurisdictions, so without the Notoriety-for-Profit law, the infamous criminal merely needs to wait a year or so before he transforms his past cruelties into large sums of money, and then humiliate his victims—on the printed page, on the silver screen, and once again, in their pocketbook.

Second, the law cures the problem of the criminal acting elusively to shield assets from the victim, such as by having the publisher pay another party or deposit the money in a bank account in some Caribbean island nation.

Finally, the law redresses the horrid inequity of criminals getting rich from their crimes while victims lack the means to recover financially from the disaster that befell their lives.

In sum, the case before the Court has nothing to do with the rights of free speech. The law in question allows Henry Hill and his ghostwriter to recount all the obscenities of his life, without molestation, in return for as much money as the public will pay them.

What the case *does* engage is a matter of creditors' rights: may New York intervene to say that certain debtors cannot avoid paying what they owe by squirreling away their assets either through phoney assignments or delayed realizations of their profits? Debtors, that is, whose sole means of earning more than prison wages is selling their tales of predation and viciousness?

To simplify the question: may New York require Henry Hill and Simon & Schuster to repay debts owed to Hill's victims before the mobster and the publisher reap all the profits of his belated, lurid confessional?

Conclusion

For a decade and more, however belated the starting point, state legislatures and Congress have taken major steps to

assist the 30 million annual victims of crime. The essence of their jurisprudence is to accord a measure of justice to crime victims—justice that compares, not competes, with the justice they have long accord accused and convicted victimizers. This Court has the opportunity to ensure that their legislative framework stays in place.

It would be tragic indeed if the Court used this case to set back the agenda for rights of victims of crime.

Respectfully submitted,

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No. 90-1059

IN THE

Supreme Court of the United States

October Term, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

v.

MEMBERS OF THE NEW YORK CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE McGRATH and ANGELO PETROMELIS

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF AMICI

The State Florida is one of forty-two states that have enacted laws to prevent criminals from garnering large profits by marketing their crime stories.[1] Most of these statutes regulating profits—commonly referred to as "Son-of-Sam" laws—are modeled after New York's law, which requires that anyone contracting for the story of a person accused or convicted of a crime deposit the proceeds of the contract with a crime victims' compensation board.[2] The board holds the funds in escrow for five years. During that period the money may be released only for attorneys' fees and for restitution to victims of the offender's crime. After the five-year period, the offender receives any funds remaining in the account.

The Florida statute varies from the New York statute by placing a statutory lien on the proceeds of a convicted felon's account of his crime. Once the lien has been perfected, the funds are distributed to dependents of the offender, to victims of the crime and to the state for its costs in prosecuting and incarcerating the offender.[3] Florida currently has three Son-of-Sam cases pending in its trial courts.

All of the forty-two state Son-of-Sam statutes prevent the dissipation of the proceeds from the criminal's story of the crime and provide a method for distribution of the assets to the victim. These statutes not only decrease the likelihood that society will have to support victims of crime, but also satisfy victims' sense of justice and desire for retribution, and increase the criminal's awareness of the consequences of his crime.

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1 *See* Brief for Respondents at n. 16.

2 New York Executive Law § 632-a.

3 Section 944.512 Florida Statutes (1989).

These statutes are narrowly designed to provide a measure of compensation to crime victims without abridging the criminal's right to tell his story and express his thoughts and feelings about the crime. It is the commercial element, the marketing and profit motive, which is being regulated, not the speech itself. These statutes, which are consistent with the values and principles underlying our First Amendment traditions and jurisprudence, provide the states with a means of assisting the victims of crime and shifting the cost of that assistance, at least in part, from the public to the criminal offender. For this reason, Florida and other amici states support New York in its efforts to affirm the constitutionality of its statute.

SUMMARY OF ARGUMENT

The Son-of-Sam law does not directly burden free speech. Rather, it regulates the contract that permits a criminal to profit through exploitation of his crime. In those instances when a publisher deems it expedient to contract with a criminal for the right to that story, the involuntary victim, by operation of state law, becomes the third-party beneficiary. This satisfies the governmental interest in assuring that the transgressor will not be further unjustly enriched at the expense of his victim.

First Amendment rights are not abridged by the application of this statute. Pecuniary gain is only one of numerous motives for a criminal to tell his story. A criminal who chooses not to share his exploits because of the removal or postponement of economic gain is merely an unwilling speaker. Should a publisher encounter such an unwilling speaker, it has alternative sources available for gathering and disseminating the desired information. The First Amendment does not grant a publisher an unfettered right to the source of its choice, especially at the expense of involuntary victims.

ARGUMENT

THE SON-OF-SAM LAW DOES NOT UNDULY RESTRICT PETITIONER'S EXERCISE OF FIRST AMENDMENT RIGHTS

New York Executive Law § 632-a does not directly abridge free speech, but rather constrains the use and disposition of commercial profits during a fixed period of time. The law regulates the contract that permits a criminal to profit by preserving a known and identifiable asset from which a victim can receive restitution, and it preserves the claim until the creation of such an asset. The intent is not to prevent the publication of the criminal author's story, but to assure the victim's rights to the money generated by sale of the story, which often has its origin in the most heinous conduct.

Petitioner and its amici argue that most would-be story tellers will decline to speak or write without a financial incentive to relate the criminal activities. They cite as authority the majority opinion of the court below, the affidavits in the record, published accounts of crimes of hundreds of convicts, and the asserted motive of Henry Hill for supplying the information for *Wiseguy*. The fallacy in this approach is that it imputes to all individuals personal economic gain as the primary incentive to create and disseminate ideas. This "market place of ideas" rationale for freedom of expression is but one of several philosophical rationales for the First Amendment. Others are individual self-fulfillment, attainment of truth, participation in decision making, and maintenance of a balance between stability and change in society.[4] None of these functions is unduly burdened by the Son-of-Sam law.

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4 *See Emerson*, Towards a General Theory of the First Amendment, 72 Yale LJ 877, 881-82 (1963).

State and local laws have historically provided the machinery specifically designed to balance larger societal interests with different, and sometimes clashing, interests of individuals in freedom of expression. While a democratic government may not seek to promote the broad interest in consensus by means of restrictions on expression, it may control conduct other than expression. *See Ward v. Rock Against Racism*, ____ U.S. ____, 109 S.Ct. 2746 (1989). So too may state law inculcate and enforce community standards of right and wrong. *See In the Matter of Children of Bedford, Inc. v. Petromelis*, ____ N.Y. 2d ____ (1991) (upholding New York Executive Law § 632-a). It is within this context that the Son-of-Sam law should be viewed.

The New York statute seeks to provide recovery to victims and to prevent the offender from deriving profit from his crime and the injuries which he has inflicted. The statute thus escrows the proceeds from the story of the crime, not to suppress the contents of the speech, but to ensure the victim's recovery of at least some small measure of damages. The statute balances the right of freedom to express views and ideas with the state's interest in compensating crime victims. If the criminal author receives no money for his efforts, there is nothing to distribute to the victims. If he is paid for his story, the victim raises his claims to the escrowed funds. The statute is limited to those cases in which the offender would be unjustifiably enriched as a result of the crime which generated his story. This dual purpose of providing restitution for victims and preventing unjust enrichment of criminals is a substantial governmental interest that is clearly unrelated to the suppression of any protected speech. *Cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (Constitution does not prevent state law from requiring the media to compensate a performer for broadcasting his act without his consent). If a state has the right to prevent unjust enrichment of the media resulting from the appropriation of an existing right of publicity, it

have the right to prevent the unjust enrichment of a criminal author who would exploit the fate of his involuntary victims.

Petitioner argues that statutory restrictions on expenditures for speech have the "inevitable effect of reducing the total quantum of speech," citing *Meyer v. Grant,* 486 U.S. 414, 423, (1988). Additionally, petitioner relies upon six other cases in which this Court has held that restrictions on payments for speech are direct burdens on speech that are invalid unless proven to be necessary and narrowly tailored to serve a compelling governmental interest.[5] In each of those cases involving the dissemination of charitable or political ideas, this Court found that the solicitation or dissemination itself was so characteristically intertwined with charitable or political issues that the regulation would affect the flow of such information. However, several of those cases expressly recognized a distinction when the sale of literature introduced "a commercial feature." *Breard v. Alexandria,* 341 U.S. 622, 642 (1951).

In *Breard,* a vendor challenged a regulation which banned door-to-door solicitations of national periodicals in residential areas. The regulation was upheld on the basis that the privacy interests outweighed the right to distribute magazines on private property by uninvited entry. This Court recognized that the sale of periodicals did not put them beyond the protection of the First Amendment. The sale, however, brought into the transaction "a commercial feature," *Id.* at 642, which distinction continues to be recognized as requiring a weighing of public and individual rights. *See Minneapolis Star and Tribune v. Minn. Comm'r of Rev.,* 460 U.S. 575, 585 (1983); *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 704 (1986); *Village of Schaumburg v. Citizens, etc.,* 444 U.S. 620, 631 (1979).

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5 *See* Brief for Petitioner, pgs. 17-18.

The Son-of-Sam statute has an insubstantial effect upon a criminal offender's opportunity to disseminate his ideas. Any inhibition he may feel to write or publish relates only to thwarted profit-seeking as opposed to informing or persuading the public. The Son-of-Sam statute is directed at the commercial feature of a criminal's speech about the crime—that is, the use of his notoriety derived solely from criminal activity to authenticate the work and enhance its market. Hence, while the criminal author remains free to appeal to the public's ever growing curiosity and fascination, he is not free to benefit himself by exploiting the victim whose involvement was involuntary. Any economic benefits derived from this exploitation must be made available to the victim who not only suffered when the crime was committed, but who must continue to endure constant reminders and revelations about the crime presented. By escrowing these funds, the statute prevents the criminal from being unjustly enriched at the expense of his victim, but does not affect his ability to tell his story.

Any attempt to establish a direct relationship between the removal of monetary incentives and a decrease in the number of criminals who would market their crime stories is speculative at best. The fact that Henry Hill and others may (according to petitioner's affidavits) refuse to speak to the press or enter into contracts to publish their personal accounts is merely indicative of the lack of a "willing speaker." However, "[f]reedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.,* 425 U.S. 748, 456 (1976). Petitioner's attempts to ascribe the motives of a few supposedly unwilling speakers to all criminals is speculative and does not demonstrate a substantial burden upon First Amendment interests. The fact that numerous offenders would be affected by the statute does not necessarily mean they would refrain from writing or publishing, assuming they had such an interest. Petitioner's arguments do not

demonstrate a "significant constriction of the flow of news to the public," as contemplated in *Branzburg v. Hayes,* 408 U.S. 665 (1972).

Criminals, as other individuals, have motivations for speaking unrelated to pecuniary gain. Some of the earliest American literature by convicted criminals was purely confessional. The author offered himself as an example for other members of society and sought forgiveness.[6] Autobiographies of anti-slavery political prisoners attempted to use the authors' personal experiences as a means of awakening their readers to the real nature of slavery and activating them to join the struggle against it.[7] Some convicts wrote protest literature against the brutality of prisons while others used it as an opportunity to articulate a political defense of the crime committed by retrying the case in the court of public opinion.[8] Still others wrote to raise money to reopen their case.[9] While some who had been incarcerated offered a plea to the reader to do something about reforming or abolishing prisons,[10] others wrote from a revolutionary perspective.[11] In a case currently pending in Florida, a woman convicted of murdering her husband wrote a fictionalized account of the crime and stated publicly that the book was not written for monetary gain but in the hopes of establishing her innocence and finding her husband's murderer.[12] It is a facile conclusion to suggest that such works would not be

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6 Franklin, Prison Literature in America, at 127 (Oxford University Press, 1982).

7 *Id.* at 132.

8 *Id.* at 135.

9 *Id.* at 151.

10 *Id.* at 137.

11 *Id.* at 147.

12 *State of Florida v. Robinson,* case # 91-1001, Circuit Court, Fifth Judicial Circuit, Marion County. *See* article, St. Petersburg Times, March 12, 1991, page 6B.

published were the author allowed only a reduced profit or no profit.

Additionally, the Son-of-Sam statute does not impede the access to effective media for criminals who want to tell their story. Rarely, if ever, would a criminal need to rely upon contract advances to cover research and other preliminary expenses because he typically sells only his rights to the story, and not his services as author. Usually, a paid ghostwriter pens the criminal's story.[13] Some criminals are willing to share their stories for no compensation at all,[14] while others actually desire to compensate their victims.[15] Under the New York law, a criminal may enter a media contract to raise money for his criminal defense, and in Florida, the statute allows payment to the criminal's dependents. In such cases, the Son-of-Sam statutes actually encourage speech rather than deter it.

The Son-of-Sam statute protects a substantial governmental interest by providing a precise and limited method of preventing criminals from being unjustly enriched by the exploitation of their crimes and by providing a fund through which the victim or the victim's family can obtain at least partial recovery for damages incurred as a result of the criminal's activities. This regulation has no effect upon the criminal's ability to tell his story or disseminate his ideas. The New York statute allows him to use up to 20% of the escrowed funds for attorney's fees. It merely deprives him of the direct use of the proceeds in favor of his victims, whose claims are far more equitable.

Petitioner and its amici cite numerous examples of authors whose writings would have been subject to the Son-of-

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13 *Okuda,* Criminal Antiprofit Law: Some Thoughts in Favor of the Constitutionality. 76 CAL. L.R. 1353, 1365 (1989).

14 *Id.* at 1364, footnote 73.

15 *Id.* at 1364, footnote 74.

Sam statutes if they had been in effect at the time of publication. However, any suggestion that authors such as Frederick Douglas, Henry David Thoreau, or Malcolm X would not have written their autobiographies is both speculative and repugnant to the very principles they espoused. Would petitioner and its amici suggest to this Court that Dr. Martin Luther King, Jr. wrote a book about the Civil Rights movement only for personal pecuniary gain? The argument also fails to take account of the fact that many of the more noteworthy literary works cited involved victimless crimes. "If there is no victim, a necessary requirement for implementation of the statute is lacking, section 632-a does not apply and the criminal may discuss the crime without restraint...." *In the Matter of Children of Bedford, Inc. v. Petromelis,* ____ N.Y. 2d ____ (1991) (Slip opinion at 14).

The appropriate test by which to judge the constitutionality of the statute was set forth in *United States v. O'Brien,* 391 U.S. 367 (1968), where the Court considered the First Amendment ramifications of a statute which imposed criminal sanctions on one who knowingly destroyed his draft card. As this Court noted in *O'Brien:*

> [W]e think it is clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that issue.

Id. at 377.

This test was subsequently noted in *Arcara v. Cloud Books, Inc., supra,* where the Court upheld the closure of a bookstore in which prostitution and other unlawful conduct

were occurring. The Court, in considering the *O'Brien* test, indicated that the legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity. In response to the argument that the effect of the statutory closure remedy impermissibly burdened its First Amendment protected book-selling activities, the Court indicated that the severity of that burden was dubious at best and was mitigated by the fact that the owners remained free to sell the same materials at another location. *Id.* at 707.\

Petitioner, a publishing company, argues that the removal of the profit incentive will reduce the number of stories generated by criminals. Not only is there a lack of credible evidence demonstrating a reduction of "willing speakers," but that argument ignores many alternative means that are available to the media to procure the necessary information. On numerous occasions, this Court has held that the First Amendment does not guarantee the press an unrestrained right of access to news sources or to gather information. *Pell v. Procunier,* 417 U.S. 817 (1974), and *Houchins v. K.Q.E.D., Inc.,* 438 U.S. 1 (1977) (affirming restricted access to prisons for the purpose of conducting inmate interviews).

Information concerning criminals and their exploits can be obtained by alternate methods. An industrious investigative reporter could obtain substantially the same results by interviewing public officials, private citizens or witnesses, and by reviewing police reports, court records and courtroom testimony. Additionally, as previously noted, in many instances the criminal will willingly forego the receipt of profits and will tell his story to satisfy some other motive or emotional need. Of course, if the criminal is willing to speak, the statute does not prevent him from telling his story. Simply stated, a publisher does not have an unfettered First Amendment right of access to all information sources. If the publisher deems it expedient to contract with a criminal to

exploit his crime, then the involuntary victim should be the third-party beneficiary. This is what the statute accomplishes. Therefore, when balancing the rights of the victim against those of the criminal and a publisher, the insubstantial burden arising from the Son-of-Sam law should be subject to the test enumerated in *United States v. O'Brien, supra.*

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

SIMON & SCHUSTER, INC.,

Petitioner

v.

THE NEW YORK STATE

CRIME VICTIMS BOARD,

Respondent

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

BRIEF, AMICUS CURIAE

IN SUPPORT OF RESPONDENT:

THE CRIME VICTIMS LEGAL CLINIC

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE COURT ESTABLISH AN ADDITIONAL CLASSIFICATION OF SPEECH, UNPROTECTED BY THE FIRST AMENDMENT, TO PREVENT PERNICIOUS PROFITEERING, WHICH OCCURS WHEN CRIMINALS SEEK TO PROFIT FROM THE COMMERCIAL EXPLOITATION OF THEIR CRIMES?

II. DO THE BENEFITS RECEIVED BY VICTIMS UNDER ENFORCEMENT OF "SON-OF-SAM" STATUTES SUBSTANTIALLY OUTWEIGH ANY BURDENS ON FREE EXPRESSION EXPERIENCED BY CRIMINALS?

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BRIEF, AMICUS CURIAE

IN SUPPORT OF RESPONDENT:

THE CRIME VICTIMS LEGAL CLINIC

---

1. Identity and Interest of Amicus Curiae: THE CRIME VICTIMS LEGAL CLINIC is a project of the California Center on Victimology, a nationally recognized comprehensive crime victim service agency founded in 1985 and based in San Diego, California. Among the goals of the Clinic and the Center are to protect the rights of crime victims in the criminal justice system, to provide training to the legal and mental health communities who counsel and treat victims of crime, and to reduce the trauma suffered by crime victims, their families, and the community in which they live.

2. Desirability of a Brief Amicus Curiae: The instant case is one which the interests of victims of crime are directly involved. Amicus represents the only law firm (legal clinic) in the country whose only clients are crime victims, and is

concerned with constitutional issues arising in both civil and criminal law.

3. Reasons For Believing that Existing Briefs May Not Present All Issues, and Avoidance of Duplication: In this brief, Amicus will discuss national policy-related and legal issues relating to the impact of this Court's decision in the instant case and in particular to the crime victim as the primary client. Counsel for Amicus has consulted with Counsel for Respondent in an effort to avoid unnecessary duplication and believe that its policy and legal arguments will present issues that are not otherwise raised.

4. Consent of the Parties: Counsel for the Respondent and Counsel for the Petitioner have consented to this filing. Letters to this effect are lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

For many years only two grounds could result in the removal of a class of speech from First Amendment protection. Either the speech was not a part of the free trade of ideas, or, it caused harm which could not be cured by the further exchange of ideas and had little or no social value. In the years since, several more non-accepted classes of speech have been recognized by the Court: "Clear and present danger", "fighting words", "libel" and "obscenity".

More recently, and by applying the same factors which set apart these original classes of unprotected expression the Court created one more category: "child pornography". Today there is a compelling need to regulate yet another type of expression, that of pernicious profiteering, which occurs when criminals attempt to profit from the commercial exploitation of their crimes.

Such expression is currently known collectively as "Son of Sam" statutes.

For the following reasons, the States should be entitled to greater leeway in the regulation of a criminal's speech when the primary motivation is to profit from the commercial exploitation of crime: (1) a criminal's expression about his crimes is harmful to the victim, and should qualify as unprotected by the First Amendment; (2) it is abhorrent for a criminal to profit while his victims suffer financially; (3) promotion of the criminal's story provides an economic motive to commit, and thus is an integral part of, the crime; and, (4) recognizing and classifying the expression of a criminal made solely for the purpose of profit as a category of speech outside the First Amendment's protection, is compatible with this Court's prior decisions concerning unprotected speech.

The Court should, therefore, create a new classification of speech that is without First Amendment protection and is designed to prevent pernicious profiteering.

In addition to the prevention of pernicious profiteering, Son-of-Sam statutes provide benefits to crime victims which far outweigh the burdens placed upon free expression experienced by criminals.

The purposes of such statutes, and the resulting benefits to victims, can be classified into four distinct categories: (1) to prevent a criminal's unjust enrichment; (2) to decrease the likelihood that society will have to support victims of crime through social service programs; (3) to satisfy the victim's sense of justice and desire for retribution; and (4) to increase the criminal's awareness of the consequences of his crime.

Criminals are not prohibited from the

publication of their stories, but are only denied the right to financial gain therefrom. Any rehabilitative benefit to criminals from publication of their stories should be attainable without the element of greed.

ARGUMENT I

THE COURT SHOULD ESTABLISH AN ADDITIONAL CLASSIFICATION OF SPEECH, UNPROTECTED BY THE FIRST AMENDMENT, TO PREVENT PERNICIOUS PROFITEERING, WHICH OCCURS WHEN CRIMINALS SEEK TO PROFIT FROM THE COMMERCIAL EXPLOITATION OF THEIR CRIMES

In 1919 Justice Holmes illustrated his belief that falsely crying "fire!" in a crowded theatre, is not constitutionally protected speech. (See Schenck v. U.S., 249 U.S. 47 (1919)). Later that year Holmes argued, in his dissent in Abrams v. U.S. 250 U.S. 616 (1919), that "[T]he best test of truth is the power of the thought to get

itself accepted in the competition of the market" and that First Amendment protection does not extend to speech which is not a part of the "free trade of ideas".

Justice Brandeis joined Holmes and expanded the theme eight years later in Whitney v. California, 274 U.S. 357, 377 (1927). He believed speech may be regulated only where "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." Thus, if the speech causes harm which cannot be cured by a "further exchange of ideas", the government may justifiably suppress it. (See L. Tribe, American Constitutional Law, 833-834 n.4 (Foundation Press, 2nd Ed. 1988)).

This recurrent theme was also relied upon in Justice Thurgood Marshall's opinion for a unanimous Court in 1977, in Linmark Associates, Inc., v. Township of Willing-

boro, 431 U.S. 85 (1977); also see Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942); Roth v. United States, 354 U.S. 476, 503 (1957); New York v. Ferber, 458 U.S. 747, at 754 (1982)(citing Chaplinsky)

> The Court has traditionally recognized,
>
> "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."

Words labeled,

> "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words....", illustrate speech causing harm that is incurable by the further exchange of ideas, and of "slight social value as a step for truth." (See Chaplinsky, at 571-572.)

Unprotected categories of speech all carry characteristics that result in reduced, or no, First Amendment protection. First, they are not an essential part of any exposition of ideas. There is no debate, dialogue or attempt to seek a reply nor to persuade or be persuaded in one's beliefs.

Second, when uttered, such expression either inflicts harm or injury (with or without the opportunity to respond) or is likely to incite action to an imminent breach of the peace or other lawless act. (See Chaplinsky, at 571-572).

When the criminal commercially exploits his life of crime, for pernicious profiteering through the media, (while his victims bear the expense and pain his crime has injected into their shattered lives) there is no attempt at debate or dialogue, nor is a reply sought. There is merely the attempt to further capitalize on and exploit the criminal act for profit.[1]

Injury caused to the victim by the mere utterance (let alone the full scale Madison-

[1] This is not to say that the criminal couldn't have motivations other than profiting from his crime, it is just to say that the expression only has First Amendment protection in the context of dialogue and not in the context of exploitation for profit.

Avenue-promotion) of the details of a crime, have been well documented. For example, studies show that school-aged children can undergo intense physical symptoms as a result of being victimized by crime in which the "sight sound and the smell of gunfire, the screams or sudden silence of the victims, the splash of blood on the child's clothes, the gasp of a dying parent..." are reexperienced. There may also be an autonomic arousal such as "My heart hurt; it was beating so loud." (See, Eth & Pynoos, Developmental Perspective on Psychic Trauma in Childhood, essay in Post-Traumatic Therapy and Victims of Violence 46 (F.M. Ochberg Ed. 1988)). In United States v. Hastings, 461 U.S. 499 (1983), this Court chastised the Court of Appeal for not considering the traumatic effect a retrial would have on the victims. The Court has also acknowledged the need to protect a

victim's peace-of-mind resulting from the pain and injury victims experience from the trial and it's ancillary publicity. (See, Justice White's dissent in Florida Star v. B.J.F., 491 U.S. 524, 552 (1989)).[2]

Very often a permanent record of the victimization is exacerbated by the circulation and promotion of a publication which can remind the victim of the traumatic event, triggering behavioral changes, fantasies and nightmares. (See, Diagnostic and Statistical Manual-III-Revised 250 § 309.89 American Psychiatric Association (1987)).

By comparing the category of pernicious profiteering to other unprotected categories of speech, a common thread is found.

Before concluding that the content of

[2] It should be noted that the Court steadfastly refused to hold either that truthful publication can never be punished, or, that publication of a rape victim's name is unprotected by the First Amendment.

speech is outside the protection of the First Amendment, the Court has always analyzed the speech by weighing the harm caused by the speech (content) against society's interest in encouraging the free flow of ideas.

Chaplinsky originated the "Fighting Words" doctrine, allowing regulation of words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace (Id. at 572)

In Brandenberg v. Ohio, 395 U.S. 444, at 447 (1969), the Court articulated that speech advocating the use of force or crime could only be proscribed if the advocacy is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action."

It takes little imagination to envision a fight ensuing if a criminal reads the details of his crime to family members of

his victim (from his book that has made the best seller's list). Although it would be also easy to envision the average reader being annoyed or even offended by the criminal's words depicting his crimes, it is likely that only the victim or the victim's family members could be provoked to the point of retaliation.

Similar potential exists upon an analysis of such expression as advocating lawless action. There are many documented cases of victims or victims' survivors harming those accused of ~~the~~ victimization. The added knowledge gained from reading about the crime and knowing the criminal has been well

paid can reasonably be expected to further inflame unlawful behavior.

When children see the glamorized version of crimes painted by books and movies such as "Wiseguy", etc., some do react by

quickly perceive that negative behavior can gain wanted attention or notoriety. John Hinkley knew, for example, that by shooting President Reagan he could gain both notoriety and the attention of a movie actress he sought to impress. Hinkley, admitted his behavior was influenced by the movie "Taxi Driver". See Low, Jeffries and Bonnie, The Trial of John W. Hinkley, Jr.: A Case Study in the Insanity Defense 23-27 (1986).

The Chaplinsky Court included libelous statements in its list of categories which are "no essential part of the essential part of ideas" (Id. at 572). In Beauharnais v. Illinois, 343 U.S. 250, at 265 (1952), the Court implied that the state could define libel in any way that "related to the peace and well being of the state", without violating the First Amendment.

New York Times v. Sullivan, 376 U.S. 254, at 279-80 (1964), placed some further

limits on state regulation of defamation actions. Most notable was the requirement of malice or reckless disregard for the truth when statements are made about public officials relating to official conduct.

Crime victims and their families are not public figures by virtue of the fact that they have been victimized. In Gertz v. Robert Welch, Inc., 418 U.S. 323, at 351 (1974), the Court narrowly defined public figures as those who have "general fame and notoriety in the community," or those who have "voluntarily injected themselves into a public controversy in order to influence the resolution of the issues involved" (Id.). Gertz also identified a category of involuntary public figure as one who is directly affected by actions of public officials such as the Defendant in a criminal case, due to the public interest in those proceedings (Id. at 347).

While unwilling to categorically determine that publishing the name of a crime victim is unprotected speech, the Court has implied that publishing facts that invade the victim's privacy or disclose accurate but highly personal facts about victims or their families is not speech absolutely protected by the First Amendment.

> "We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim... We hold only that where a newspaper publishes truthful information... lawfully obtained, punishment may lawfully be imposed... only when narrowly tailored to a State interest of the highest order...." (Florida Star v. B.J.F.,491 U.S. 524 (1989).

Once again, the common thread is one linked to the protection of individuals from the injurious words or potential actions of others, and which through careful analysis, has been committed to the elevated category

of compelling state interest.

Miller v. California, 413 U.S. 15 (1973), set forth the three part test for identifying material which may be banned as obscene.

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id, at 24.

When faced with the problem of how to take the obscenity test one step further in order to craft a new class of unprotected speech, child pornography, the Court in New York v. Ferber (458 U.S. 747 (1982)), first acknowledged that:

> "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." Id. at 757.

As the basis of this acknowledgement the Court deferred to legislative judgement and focused on the harmful effect of the exploitation of these children victims by those who seek to make a commercial profit from their illegal activity, noting:

> "[T]he use of the children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child....Because [in part] the child's actions are reduced to a recording, the pornography may haunt him ... long after the original misdeed took place." Id. at 757.

And;

> "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an illegal activity throughout the nation." Id. at 761; Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

The harm caused by the exploitive use of children in the production of pornography is analogous to the harm caused to the victims of violent crime. Eth and Pynoos Id.

> "Recurrent and intrusive recollections of the event; anxiety dreams; psychic numbing with markedly diminished in terest in activities; fear of repeated trauma; and persistent feelings of guilt out of proportion to personal responsibility."[3]

The sponsor of the New York State statute in question in Simon and Schuster v. Members of the New York State Crime Victims Board 724 F. Supp. 170, State Senator Emmanuel R. Gold has stated:

> "It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four calibre killer, can expect to receive large sums of money for his story, once he is captured, while five people are dead, and other people were injured as a result of his conduct... This statute would make it clear that in all criminal situations, the victim must be more important than the criminal." (Id.at 174, citing Memorandum R. Gold, 1977 New York State Legislative Annual, 267)

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[3] Eth and Pynoos are citing the DSM-III-R (1987) diagnosis criteria for Post Traumatic Stress Disorder (PTSD), which they maintain has equal effect on children who have been physically abused as well as those who have been kidnapped, or witnessed a homicide.

Twenty-nine States have modeled and passed legislation similar to 632-a, See 60 ALR 4th 1210 § 2, as recognition of the compelling need to prevent criminals from profiting from the commercial exploitation of their crimes.

Similarly, in Ferber, twenty states had regulated the distribution of child pornography without requiring that the exploitive material be legally obscene. Id. at 749.

Another reason given by the Ferber Court for establishing a new unprotected class of speech was that:

> "Printed materials cannot be isolated or removed from the process involved in developing them." Id. at 762 fn.13 citing Texas House Select Committee on Commercial Exploitation 80.

It appears that the Ferber Court was correct in its application, since Justice Keenan indicates in his opinion in Simon and Schuster, at 176, that Petitioner suggests Mr. Hill, a convicted criminal, whose life of

crime was the basis of the book Wiseguy, would not have cooperated had the Petitioner complied with § 632-a, because he would not have received an immediate profit from his commercial exploitation.

The Court should apply the same factors as in other categories of unprotected speech, creating a new classification, pernicious profiteering, that applies to criminals seeking to commercially exploit their crimes.

ARGUMENT II

THE BENEFITS RECEIVED BY VICTIMS UNDER ENFORCEMENT OF "SON OF SAM" STATUTES SUBSTANTIALLY OUTWEIGH ANY BURDEN ON FREE EXPRESSION EXPERIENCED BY THE CRIMINAL

United States Supreme Court Justice Byron White has stated that the most basic function of any government is to provide protection for its citizens (Miranda v.

Arizona, 384 U.S. 436 (1966)). Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people, and each individual in society has a right to be protected by the Government in the enjoyment of life, liberty, and property (The Declaration of Independence preamble (U.S. 1776). In preventing criminals from being given the opportunity to reap an immediate profit from the depiction and commercialization of their crimes, the States are preserving the liberty and privacy of those victimized.

Victim participation in, and support of, the criminal justice process is essential for the system to operate efficiently. An old idea, newly rediscovered, says that justice cannot be done without taking the victim's interest into account. There is every reason to believe that in a society where government provides rights to tort

recovery and/or no fault social insurance programs for the victims of industrial accidents, natural disasters, unemployment, and hazards of all sorts, that same government can provide for a similar level of financial assistance to victims of crime. It is not unreasonable to expect such a theory to be expanded to provide at least a basic safety net of financial protection for the crime victim.

One such method of expansion has been formed in the so called "Son of Sam" statutes. These statutes are designed to prohibit a criminal from a pernicious profiteering from the sale of his "story" to any interested party, who in turn, sells it to the public. The Son of Sam statutes, derive from the basic premise that "no one shall be permitted to profit by his own fraud, or take advantage of his own wrong...or to acquire property by his own crime." (Riggs

v. Palmer, 115 N.Y. 506, at 511-12, 22 N.E. 188, (1889)) As further expressed in Riggs, these maxims are dictated by public policy, and have their foundation in universal law administered in all civilized countries (Id. at 522).

The primary attack on this theory of unjust enrichment, is that it violates freedom of speech under the First Amendment. However, First Amendment privileges do not guarantee an absolute right to speak or to publish, (Schenck v. United States, 249 U.S. 47 (1919); Branzburg v. Hayes, 408 U.S. 665 (1972)) and the societal value on free speech must, on occasion, be subordinated to other values and considerations (Dennis v. United States, 341 U.S. 494 (1951)).

Although the First Amendment guarantees the freedom of expression, it does not guarantee the right to be paid for that expression. New York's Son of Sam statute,

section 632-a (N.Y. Exec. Law, section 632(a) (McKinney 1982 & Supp. 1990), has served as the model for a majority of the States, which, in itself is indicative of this law's general acceptance by the American public.

In order to determine whether a First Amendment violation has occurred, both the benefits and the burdens to the affected parties must be compared, then measured against the express purposes of the statutes. Finally, the Court must then conclude which interests are more compelling.

The purposes of such statutes can be classified into four distinct categories: (1) to prevent a criminal's unjust enrichment; (2) to decrease the likelihood that society will have to support victims of crime through social programs; (3) to satisfy the victim's sense of justice and desire for retribution; and (4) to increase the

criminal's awareness of the consequences of his crime (See Okuda, Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality, 76 Calif.L.Rev. 1353 (1988)).

Denial of payment for expressive activity could be construed as a direct burden on that activity (Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886 (1988)). In some cases, writing or relating the experience of com mitting a crime is a form of rehabilitation for a criminal. There is no doubt that the state has a compelling interest in rehabilitating criminals. If, however, a criminal is writing or speaking to the press as a means of rehabilitation, then the publicity would occur regardless of any monetary incentives.

States have further recognized that it is far better to have criminals writing about their past crimes than engaging in

future ones (USA Today, February 20, 1991). Notorious criminals, presently incarcerated, may be more concerned with future parole considerations than monetary profits. Reputable publishers may actually be more likely to enter into contracts with notorious criminals because the regulation by the state, coupled with the fact that most monies will eventually be paid to the victims, tends to remove the moral stigma and negative publicity that might otherwise result from entering into such contracts. (11 Pepperdine L.Rev. 55 (1984)).

How then, does the curtailment of these benefits to criminals compare to the burdens suffered by those they victimize?

It is a well-established principle that our free speech protections are not absolute, and our legal system has many accepted restrictions, for instance, on those convicted of serious crimes. A convicted felon

gives up many guaranteed rights enjoyed by law abiding citizens: state laws prohibit murderers from profiting from the life insurance policies and testamentary gifts of their victims. Furthermore, although the state has an interest in the rehabilitation of the ex-convict, the state has at least an equally compelling interest in the rehabilitation of innocent victims of violent crime; and by no means should convicted criminals reap the fruits of their crime while their victims remain uncompensated.

The Son of Sam statutes are not an absolute prohibition on the ability of the criminal to profit - the statutes merely divert the profits for a statutory period in order to ensure that victims may be compensated (In the Matter of Application of Children of Bedford, Inc., 541 N.Y.S.2d 894 (Sup.Ct 1989)). The criminal might see a monetary benefit; but only after those

victimized have their chance for just compensation.

The State's compelling interest in protecting the privacy rights of crime victims is equally as important as that of rehabilitating criminals. The primary societal goal is to assist crime victims to return to as productive and normal a life as possible. This "rehabilitation" of crime victims demands that respect be given to their need for privacy. Victims are not victims by choice, nor have they voluntarily thrust themselves into the public eye. A continuing threat of media exposure and disclosure is counterproductive to this process (Briscoe v. Readers Digest Association, 4 Ca.3d 529 (1971)).

The legitimate public right to know should stop short of inflicting harm upon an already traumatized victim. They should be spared the further agony of knowing that

perhaps hundreds of thousands of people are reading the details of their children's deaths-and that the criminal is being paid handsomely to provide this diversion.

Burdens suffered by victims after the actual event begin with the seemingly endless march through the criminal justice process (in fact, this is the single most stressful experience aside from the initial traumatizing event (President's Task Force on Victims of Crime, Final Report, Dec. 1982; Statement of the Chairman)). Arraignment, bail, preliminary hearings, trial, sentencing, and appeals; each forces the victim to relive the victimization. Simultaneously, victims are often reminded continually of their victimization through media exposure.

> "What really is at issue... is not merely the distress the individual suffers as a result of the reawakening of his agony, but the debasement of his sense of self as a person that results because his life has become a public spectacle against his will. There is anguish and mortification, a blow to human dignity, in having the world intrude as an unwanted witness to private tragedy. The wrong is to be found in the fact that a private life has been transformed into a public spectacle." (See, Bloustein, Privacy, Tort Law and the Constitution: Is Warren Brandeis' Tort Petty and Unconstitutional? 46 Tex. L.Rev. 611 (1968)).

Henry Adan, father-in-law of Richard Adan, an aspiring performer who was stabbed to death by paroled killer Jack Henry Abbott in 1981 has been quoted as saying "They throw it in our face...What rights does this murderer have to make money off Richard Adan?" ("Son of Sam Law Ignored", New York Daily News, January 1986).

A statement that invades a person's right to privacy carries with it other significant consequences. Ordinarily,

unwelcome dialogue can be banned if (a) it enters one's home; or if (b) listeners cannot turn their view away from the discourse (Erzonznik v. Jacksonville, 422 U.S. 205 (1975)). Victims of crime are involuntarily subjected to both types of communication. It is virtually impossible for victims to turn their heads away once the momentum of public curiosity about a notorious crime takes on a life of its own, and publishers with visions of dollar signs, insist upon contracting with criminals for their stories.

The emotional responses to violent crime commonly include shock, disbelief, sleeping and eating disturbances, inability to concentrate, and withdrawal from normal human relations. (See generally, M. Bard & D. Sangrey, The Crime Victims Book (1986); Kilpatrick & Otto, Constitutionally Guaranteed Participation in Criminal Proceedings

for Victims: Potential Effects on Psychological Functioning, 34 Wayne L.Rev. 7 (1987)).

By examining the effects of "Son of Sam" statutes to all parties involved in their enforcement, it appears that the interests of the state in compensating victims of violent crime, or at least giving victims an opportunity to be compensated, are more compelling than the interests of the criminal who wishes to write his story.

Any infringement upon First Amendment rights is merely incidental, while the goal the law is serving, that of allowing crime victims an opportunity for compensation - is of vital interest to the State.

Amicus urges the Court to find that the burdens forced upon victims of crime by pernicious profiteering substantially outweigh any benefits received by convicted criminals.

CONCLUSION

The court should apply the same factors as in other categories of unprotected speech, creating a new classification, pernicious profiteering, that applies to criminals seeking to commercially exploit their criminal stories.

To support the unanimous opinion of the Court in Ferber Justice White wrote:

> "Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.... When a definable class of material ... bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment." Id. at 763-764.

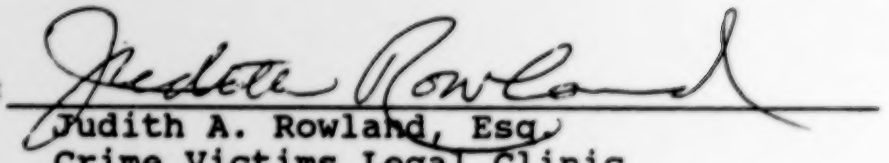
Amicus urges the Court to apply this standard to the present case, recognizing the common thread, be it exploitation of chil-

dren by the sale of pornography or the exploitation of children by making a movie of how their mother was raped and stabbed to death in the child's presence.

Amicus further urges the Court to create a new class of speech, pernicious profiteering, which is without First Amendment protection, and applies to the expression by criminals made for the purpose of commercially exploiting their crimes.

Amicus also respectfully requests the Court to conclude that the benefits to victims, represented by Son of Sam Statutes, when compared to the burdens imposed upon criminals, far outweigh those burdens, and that the court find those benefits to be compelling.

Respectfully Submitted,

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